re James Gould at Litchfield Law School.

from Diary of O H Fitch:

Westfield, Mass. Oct 10, 1824: "In Rec'g Maja G. Painter presented me with his manuscript Lectures on Law by Judge Gould. He expects to leave town tomorrow morning for New Orleans"

Tapping Reeve (1744-1823) opened his famous law school in Litchfield in 1784. He conducted it alone until 1800 and then until 1820 with the help of James Gould who succeeded him. Gould (1770-1838) ran the school until 1833 when he closed it.

OVER

Yale grad 1791 Began studying law with Tapping Reeve in 1795. became his colleague in 1810

According to D.A.B. "He read his lectures so slowly that not a word was lost, every student being able to make a verbatim note" — "In the more abstruse subjects of the law he was more learned than Judge Reeve, and as a lecturer more lucid and methodical."

Mr. & Mrs. Frederick Waring
Western Reserve Academy
Hudson, Ohio.

Published by James Gould Lectures on Law 1826
(no accredited May be Painter
(date given)

Lectures on Law

Upon the Title

Contracts, Covenant Broken, Bailments

Inns & Inn Keepers, and Evidence.

Delivered

Before the Members of the Law School in

Litchfield Conn.

By James Gould.

A Judge of the Superior Court of Connecticut

Contracts.

Definition

A contract according to Blk. is an agreement to do or not to do some particular thing upon sufficient consideration. 2 Blk 442. Powell defines it to be a transaction in which each party comes under an obligation to the other and each acquires a right to what is promised by the other. 1 P. 5-7. The term includes both agreements executed as gifts grants bases etc. and also those which are called executory as covenant, promises etc. there being in both a concurrence of the parties to an agreement respecting property or some right which is the subject of the stipulation.

Assent

The assent of the parties. This enters into the essence of every contract without it there can be no agreement and of course no obligation created or dissolved. Pow. 9. 2 Blk 442.

Requisites

The requisites of contracts are 1st Parties 2d Mutual assent to some stipulations 3d the obligation to be created or dissolved.

Persons incapable of contracting

Hence a person non compos mentis who is subject either to delirium Senility Fatuity or Madness cannot make a binding one he has no understanding and therefore in legal jug't no will. In general Con's not of record made by such persons are mutually void and the better opinion is that no est. factum when appropriate may be pleaded to them. 1 Pow. 11. 2 H Co. 123 B. 2 Rol. 428. Show. P. C. 132 11 Rep. 87. Thus the surrender of a particular estate by a person non comp. mentis does not destroy a contingent remainder depending upon it. 1 Pow. 12. 3d Mod. 305 Dal. 378 Id. Raym. 316. 3 Lev. 84 3 Vent. 198 Carth. 211. 51-435 Com. 138 478. Quere Can mis est factum be pleaded by such persons. Opinion contradictory. Cp. 330 Dal. 378 4 Co. 123. St. 4104 Bul. 142. But persons insane are competent to pass or property by a revocable title as by gift or devise as well as by deed there being an assent raised by the mere presumption to what is for the benefit of the party. 1 Pow. 12. Co. Litt. 2. 3 Chan. R. 2 Vent 403 and if the insane devisee or donee recovers his understanding and then gives his assent to the transfer of the property it is binding. But if he dies during his insanity or having recovered

ner reason dies without assent the heir may avoid it. Pow. 13 Co Litt 2.
1 Vent 203. But there is no such presumed assent to cont^s by a person
non comp. to alien his property or to create any obligation on himself.
These fall within the gen^l rule of 1 Pow. 14. It is however a rule
of the Com. Law that a person on recovering his understanding shall
not disable himself or as it is termed "stultify" himself 1 Pow 11-20
Pre Ch. 398 692. 11 Co. 123. 1 Vern^n 41-3. 3 Bac Ab 87 Litt 113. Bul 179
T. 1104 - 2 Vent 198. Dod Dum. This rule is founded on reasons of
policy to prevent pretended insanity. 1 Pow 16 3 Bac 87 4 Co 124-5
No one may aver his own insanity but after his death his heirs
& exec^rs may avoid his cont^s if the description. 3 Bac 87. 4 Co 124-5. D. & B. 203
Ca Ch. 318. There are also two modes by which his cont^s may be
avoided during his life. 1^st In England, issue found upon the writ "de
Idiota inquirenda" the King as Parens Patriae may by scire facias avoid
all alienations gifts and the acts "in pais" of the Idiot and the
issue has relation to the commencement of his disability and then the
cont^s made subsequent to his incapacity are null & void. 1 Pow 245-7
Sink 40. 4 Co 126-7. 8 Co 170 3 Bac 88-9. –

2^nd A suit may be brought in chancery for the same purpose by the
Attorney General or the committee of the Lunatick but the non.
Com. should not be a party. 1 Pow 26-7 2 Vent 414 3 P. W. 101-5
3 Atk 171. 1 Eq. Ca. Ab. 279. But if a suit is brought in Eq^y in
behalf of a Lunatic to compel the performance of a contract
made with him in that case he should be a party, for his
object is not to take advantage of his incapacity but to enforce
an equitable claim, the committee is but his bailiff. 1 Pow 84
3 Bac 87 D. 2. 3. 4 Co 125-6. 2 Vent 112-4 – But Idiots and
Lunaticks are bound like other persons by contracts and acts
of record as in the example of fines & recoveries which cannot
be avoided either by themselves or their heirs as no averment will
be received contrary to a record – 1 Pow 21-2. 4 Co 124
Co Litt 247. 11 Co 42. 3 Bac. 88. An Idiot is a natural

Non-cont^s of a lunatic may be avoided

fool or one who has no understanding from his birth. 1 Blk. 304
3 Bac 30. 4 Co 125. Litt 223. A Lunatick is one who has
become insane through supervening causes C. Litt 24.
Drunkenness though a temporary insanity is not a ground of
avoidance either in Law or Equity for it is his own fault.
The rule is founded in policy. 3 Pow 131. 1 Ves 19. 1 Hen. 62.
2 Leo 162. Contra Bulle 172. But if a person draws another
into a contract by leading him into intoxication Equity will relieve
because it is the proviso by fraud 1 Pow M. & W. 131.

Infants assent

On the same principles of want of assent to cont.
there which are made by Infants are void. There is however an exception in the case of necessaries which is admitted from the nature of
the case it being altogether unavoidable. 1 Pow 32-3-9.
In judgt of Law Infants have no discretion no physical power of
assenting to Cont. See Parent & Child.

Femes Covert

The Cont's of a feme Covert are uniformly void for want of
a moral capacity to assent. her will being in apprehension of Law subject
to her husband's and her cont's bind in general neither the one nor the
other. 1 Pow 59. 112. But there is another Ground on which her
disability rests viz a want of property over which she may cont's
See Baron and Feme.

Assent when binding on others.

Who may bind others by assent? If a tenant in tail cont's to
alien his lands he is bound by such Cont. though it be to the
disherison of issue in tail, and Chancery will compel him to
levy a fine or suffer a recovery, and tenancies in tail are not favored.
1 Pow. 112-3. 1 Ch Ca 173-185. for the beneficial interest is in the
former and the trustees are mere depositaries of the title for his use.
So also the trustee may bind the estate of the Cestuy que trust
by a conveyance to one having no notice of the trust. 1 Pow 113.
1 J. K. 733-7 id 47-663 8 id 516. 1 H B. 334-447. Pow Mort. 293
for a purchaser is not to be affected by such a latent right of
the existence of which he had no knowledge. Likewise an

ancestor by an agreement to convey his estate can bind his heirs and they after his death can be compelled to perfect the alienation and the purchase money will go to the personal representatives. 1 Ves 118. 2 Ves 213. Dr. Chan. for at the time of the contract the estate was in the ancestor absolutely, the heir had no sort of title to it and therefore the purchasers equity is the prior and the better one and an agreement to convey an inheritance by tenant for life may be enforced in Chan. against the heir when such agreement at the time of making it was clearly advantageous to the latter. 1 Ves 115 b. 4 Bro Par Ca 435. A mother acting under special circumstances as Ad[x] may bind her infant child in Eq. 1 Ves 123. 1 Ves 246. Chan in such cases exercises discretionary power which is derived from the King who is guardian of all Infants ex officio. So the contracts of a woman before marriage bind her husband whom she afterwards marries. 2 Ves 448. 1 Salk 391. 11 Mod 150 1. 243. for as he takes her property and as the marriage extinguishes her original free liability he ought to take her "cum onere". At Law the real estate of a feme covert cannot be alienated except it is by fine or common recovery but the agreement of the Husband to convey such real estate if assented to by the wife on a private examination can be enforced in Chan. but otherwise 2 Ves 124. 374. Tenant in tail agrees to convey his estate and dies. His ex[r] cannot be compelled to execute the conveyance though he might have been, & his claims from the donor and not from his ancestor which is "per formam doni" and tho the donee might have barred the entail yet not having done it, his own agreement shall not deprive the issue tail of their rights. 1 Ves 125 n 1 Ves 230 n 2 Vent 351 n Abb 203 Ch Ca 171. Dr Ch 278. 2 Ves 634. but it is otherwise if the issue received the consideration for which the ancestor agreed to convey the former has the benefit of the cont. and is therefore bound in conscience to convey. 1 Ves 125. Ch Ca 171 so also an agreem[t]

by the tenant in tail to dispose of the lasting improvements of the estate to the sale of timber cannot be enforced against the issue with the same exception however as above 1 Bro 150 11 Co 16 Bepk 194 A man & his Exrs & Admrs are implied by himself and are in general bound by his acts without being named. 1 Bro 128 2 D. & M. 197. An Atty. whose duly authorized may by an agreement bind his Client and will not himself be subjected. 1 Bro 128 3 D. & M. 277 2 Cy. Ca. 31 Dro Eq. R. 84 But if the atty. is not authorized he is himself liable and not his Client. 1 Bro 128 2 Ver 127 Quere Can the Cont be enforced against him except in Eq as for if the other party should sue him would there not be a variance. But might he not be subjected at Law if not on the Cont at least on the ground of fraud or perhaps on an implied agreement. If a Joint Tenant agrees to alien his part and dies the survivor cannot be compelled to perform it for his Estate is prior to that of the purchaser to any part. 1 Bro 129 2 Ver 63 But if the agreement amounts to a severance the Estate is accordingly in Eq destroyed 2 Ver 634. 1 Ch R 57 3 D. & M. 1 Bro 129 Does not the agreement always amount to a severance in Eq if it be such that Chan would enforce it against a tenant in severalty? —

agreement to give

How assent may be given to a Contract. —

1st Express

It may be either express or implied. Express assent is declared by some sign intended to designate it, as the signing ones name, livery of seisin by the Eccl law &c and may be either precedent concomitant or subsequent to the principal act. 1 Bro 131. C. G. 1st A master agrees his servt to buy goods. 2 He buys himself and promises on delivery to pay for them 3rd The servt buys in pursuance of a previous authority and the Master ratifies. Assent in implied consent may arise several ways as by silence or inaction. If a prior Mortgagee while the Mortgagor is contracting with another for

2 Assent implied

a second mortgage his incumbrance will be postponed on the ground of implied assent 1 Sch 132-3 1 Ver 37 2 Ch 191 1 P. W. 393 Sch 183 1 Ver 5 1 Bro Ch 357 It any rate he would loose his property on the ground of fraud but the supposition of assent seems to be sufficient. So also if the Lessee is present when the Lessor makes another lease of the same land and does not give information of his title such second lease will come at Law prevail over the first. 1 Sch 132-3 2 Sch Apport 183-5. 2 Ves 150-239 1 Eq Ca Ab 355 And Court will enforce such assent even against an Infant for whom he would practice a fraud. 1 Sch 134-5 Fitz Mon 186 Sum. 172-3 And it has been holden that the first mortgagee being a witness to the deed was sufficient evidence of his knowledge of the contract and that he must prove the contrary to save his priority. This Law however is denied by Lord Hardwicke and Thurlow and said to be dangerous as facilitating the commission of fraud against the next Mortgagee. But to raise such implied assent it is not only necessary that the party should know that his claim interferes with the subsequent contract, but that his silence must be voluntary for if he be coerced or awed into silence his claim or interest would not be affected. Sch 134-5 upon the same general principle if the holder of a note that is dishonored neglects to give seasonable notice to the endorsers he is considered as agreeing to their discharge. 1 Sch 135-6 1 J. R. 176-7 Doug. 694 Chitt 98-9 122-4 202 And in general the Law will raise a tacit agreement to give effect to some principal agreement Thus if a man make a sale of timber growing on his land he tacitly agrees that the vendee shall have free ingress & egress to cut and carry it away & thus also one who lets a chamber tacitly agrees that the lessee shall have free access to it. 1 Sch 136 2 Sch 35 Sugd V. & P. 13 Co Lit 56 Thus is one tacit agreement annexed to all contracts viz that I either will, or have to perform the

will pay to the other the damage sustained by non performance. 1 Sm 137. 2 Burrow, 1011. 2 T.R. 166 1 H.B. 91. When one man usually employs another to trade for him he is the agent to any person with which the other may trade in his name. 1 Sm 138. So every payment, gift &c there is a tacit assent on the part of the [illegible] man, is supposed willing to do that which is beneficial [illegible] 1 Sm 138-9. So also the heirs & assigns [illegible] is always supposed. So also if the Drawee of a bill refuses to accept according to the usage the Law implies an agreement on part of the Drawer to pay to the Drawee whatever he may pay for the honor of the Drawer. 1 Sm 139. 1 Ch. 103 22-63-88. 209. 3 Sm 104. So if a husband turns away his wife that act amounts to a tacit assent on his part to all her contracts for necessaries. 1 Sm 139. Upon the sale of personal chattels there is an implied warranty that the vendor has a good title. So same as upon a real estate. 1 Denio, 419. 6 Cr 532. 3 T.R. 51.

(agreement) What circumstances invalidate an assent.

Ignorance & Error has sometimes the effect. If a mistake in one party as to his own papers is occasioned by the fraud of the other the contract is not binding. 2 Sm 1140. Thus the release of an heir who was induced to believe that the title of his ancestor was flatly executed and which was given for a trifling consideration has been set aside in the ground of fraud & imposition. 1 Sm 239. 4 Burr 934. 1 Burr 19, 20. But such a release would be good if it respected a doubtful right though indeed it should not be executed by the party entitled for it was well known that there was an uncertainty and each would risk the loss of what might possibly be his own. Of the common case of a compromise between litigating parties for example. But if the party is ignorant of the extent of his title and has not the means of information himself, he is not as the case may be bound. —

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Thus a Daughter accepted of a Legacy of £1000 instead of £1000 which was her Portion at Law and gave a release. Thus was set aside on the above principle. 1 Cox 144 S. 3 P.W. 315. 2 Eq. Ab. 90. And in the case of Sandstown v Stanhope both parties being deceived by the error of the other the Cont. was annulled in Chan. The case of a Schoolmaster. 1 Cox 150. Moseley 364. It is not like the compromise of a doubtful right for the sake of quietness. Generally speaking Ignorance of the Law is no ground of relieving a Cont. 1 Ch. R. 296. 2 Ch. 469 Mistaking Cont are binding at Com Law and it is not necessary in the validity of them that the event should be in the Contingent. for it is enough that it is equally uncertain to both parties and therefore Ignorance does not invalidate the Cont. 1 Cox 146. Cook 37. 2 Ab. 616. 3 Ch. 693. As to cases in which the Contract of the purchase of an estate is invalidated by erroneous representations respecting the circumstances or qualities of it. This distinction is to be observed, if the mistake be concerning qualities & circumstances which furnished the principal motive to the purchase the Contract is not bound. Thus if one buys a piece of land at a distance on which there is supposed to be a Mill and it turns out not to be true the party is not obliged to take the Land. if his principal object was to erect a Mill. 1 Ca. 147-9. 2 Ch. 196. 2 Ch. 31. 1 Ver 32. 2 Ch. 185. 1 Ver 466. it cannot be enforced in Chan. 1 Cox 149.

Requisites of Contracts. — Requisites of Contracts. — The Cont. must be 1st possible, 2d Lawful 3d Certain. 1 Cox 175 b. —

1st It must be possible for no right can be acquired or obligation created by a Cont. to perform what is impossible. It is nugatory as there can not be in the nature of things any performance of it. 1 Cox 161-78. Dy. nor Co get and carry sea impossibilia 1 Ch. Ca 220. 6 Co 26 b. Dyk 755. E.G. A covenant to convey me of Lands beneath the ocean

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A covenant to pay to A or bearer is three days & is becomes non suit when there is no action. 1 Bend. 39. 139. 1 Show 179 6 Litt 216. York 755. 2 Keys May 7. But the Law distinguishes between acts and things impossible and those that are impracticable to the party undertaking for an agreement to perform the latter is binding. Hob 78 Cro Eliz 3. the estate of a testator is liable in damages for non performance though Executors will not decree a specific execution 1 Eq Ca Ab 163 pl 2. Ca T Hardr 155. In the former case the impracticability is evident to the parties at the time but not in the latter. One may agree to deliver two grains of corn on monday and so in progression doubling the quantity on each succeeding monday & the year the promissor was bound & liable to pay something. So an agreement to pay for the horse a barley corn to the first nail &c. & is liable to pay the price of the horse. 1 Ld Ray 112. 2 Ld Ray 1164 6 Mod 301. 1 Burr 2 vol. 1 Wils 295. 1 Term Rep 645. 2 Ld Ray 1118 Upon what rule is this decision founded for it is a general rule if the thing stipulated for is not delivered its value is the rule of damages. A covenants that if he dies without issue his lands shall be settled on B. This is binding and may be specifically enforced in Chan. 1 Ld Ca Ch 164. So the stronger side the performance is not so far from being impossible 2 Eq Ab 170. Ca 11 And if one covenants absolutely to perform a thing if impossible in law prevention & performance by inevitable accident will not excuse him. A covenants to be at a particular port at a given time and is prevented by a tempest. A is liable on his covenant. 3 Burr 1636. 1 Salk 311 Ray 209. 2 Ld Ray 1220 So if one be restrained by an injunction against the exercise of his trade but if the disturbance has been such as rendered it impossible to perform before the expiration of the time limited it is otherwise.

Covenants must be construed

2 Simpl

Else they are void for no one can be bound to do what the Law prohibits 1 Ca Ab 164-5. A contract is against law where the agreement is to do some thing which is malum in se or malum prohibitum.

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1 Sw. 165. — 1 Ves. 19. The first kind are all those Contrs. which have for their object something prohibited by the Law of nature as murder &c. the rest to use a term some of which be will not [illegible] 1 Sw. 166. 1 Hen. 153. 1 Show. 213 Cop. 39. — Contracts are against Law when they have something for their object which though not against the Law of nature & the Divine L. are not contrary to the L. of the land or the municipal Law. Co. Litt 206. And a Cont may be contrary to the Law of the land as being 1st against the Publick welfare 2d repugnant to some maxim or principle of Law 3d opposed to some positive Statute. Cop 39. 1 Ld. Ray 77. 1 H.B. 322-4. 2 Wils 31. 3 D.R. 17. 22-3. 7 Ves 345. 8 Ves 89. — 4 All contracts in restraint of trade being deemed to the welfare of the State are against Law and therefore void 1 Sw 106-7. Atk 67. Ow 113. 2 Vez 211. Bay 292. Co. Ent 72. 1 Sid. 3 3. So are all contracts in general that tend against national policy. 1 H. Blk 329-7. 7 D.R. 463-8. 8 Ves 89. Cop 39. The same rule with respect to restrictions on trade even for a limited period. 1 Sw 167. 7 D.R. 513. Mr 115. Cro J. 596. Co Litt 266. 1 Sw 181. If a husbandman agrees not to cultivate his lands. 1 Sw 167. 1 Vez 33 B. But an agree not to exercise a trade in a particular place is binding as such contracts may be useful. 1 Sw 157 8. Cro J. 596. 2 Salk. 136. Salm 172. Jones 13. But a Cont of the latter sort is not obligatory unless there be a sufficient consideration. and on this point the onus probandi lies on the party claiming the benefit of the Cont. the presumption of the existence of such consideration is against him. 1 Sw 168. Atk 67. 1 Vez 459 Mr 115. 2 Vez 242. Salm 172. 1 P. Wms 181-92. 10 Mod. 27. 33-130 and it is immaterial whether the trade which one agrees not to pursue be professional or not. the validity of the Cont. in both cases depends on the reasonableness of the restraint for no man ought to preclude himself from engaging in any useful trade and the policy of the Law is opposed to the Cont. 1 Sw 167. 1 P. Wms 181-92. By the same general rule an agreement or Bond for unlawful maintenance is void

it is against the publick welfare. 1 Sm 172. Smith 22. 2 Str 814. 1 Bl 43
A contract with the slave owner is void because it tempts him to
neglect the safety of the slave. 1 Bl 172. 3 Bur 1731. 1 Str 93
also an insurance of the property of an alien enemy is void for it supports
the commerce of the enemy and [illegible] 3 D. R. 398. 6 D. 35. 1 Bl 393. 1 Bl 475. Doug 239. But this
rule that contracts with an alien enemy are void is not universal for those
which are called sacrosanct are obligatory. Thus a master of a ship
who has been captured and bound [illegible] to pay ransom will be
enforced in a court of Admiralty. 3 D. is a rule of the Law of Nations
Dougl) 3 Bur 1354. 1 Str. 648. 2 Ves 446. But it will
make no difference if the voyage was to the captor he taken himself with
the master, for the duty exists independent of the voyage. Doug 613.
1 B. & P. 563. 3 Bur 1794. [illegible] 1 Salk 46. But a promise
is void if a state of hostility exists between the belligerent states.
Doug 624. C. J. Treaties of peace between belligerent States, truces, capitulations, and agreements in a siege
[illegible] Marriage Brokage Bonds are
void because of dangerous tendencies to society. 1 Ves 174-5.
1 Ch Rep 47. Show 95. Prec 245. 1 Bur 470-5. 6 Mod 134. 3 Lev 61
The same rule prevails with respect to promises and agreements of the
same kind. 1 Ves 174. 2 Mod such shipped to any marine or
mariner. 1 Ves 166. Where if the promise or the consideration is opposed to such principles the whole void is illegal
and cannot be enforced. 1 Ves 176. 1 Bul 23. 2 Salk 67. If the
Sheriff [illegible] for a valuable consideration to permit one to escape it is void.
Now the promise is illegal. 11 C. & F. 102. 2 Ry 334. 1 Ves. C. 199.
So also a promise by a minister of justice to do an unlawful act or by
the other to reward him for doing it is void. Cro C. 236. But when
the fact which makes a contract unlawful is unknown to the promisee
a contract of indemnity founded upon it is binding. Thus A. brings B.
to be sued on pretence of having arrested him and promises to

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innkeeper that if he will retain him he will indemnify him this Cont. is obligatory and should the innkeeper be subjected the promisor would be liable. 1 Pow 177-8. Hulton 53. So if the Sheriff & Pl. request the Sheriff to take certain goods as the property of the Def. and promises to indemnify such promise is good. 1 Pow 178 Cro. J. 752. All Cont. which militate against morality and decency are void as wagers with respect to character &c. Cro. J. 39. 727-35. 1 Pow 180 233. 2 D. K. 610. 3 ib 693. So the same law as to all Cont. as a bet with the view of influencing a vote at an election. 1 Pow 182 Cro. J. 39. So the same of a wager with a Judge or Counsel by way of bribe. 1 Pow 184. 2 Bl. R. 43. But a wager between a Pl. & Def. as to the ultimate decision of a cause good at Com Law 1 Pow 184 Cro. J. 37. and indeed wagers in general are thus obligatory 1 Pow 142. But in connect. all wagers are now illegal by statute. (ad Leuc. except as to wagers in gaming) Cont. in fraud of third persons are void. Thus an agreet between two settlers to defraud the Govt is void at Law as well as in Eq. 1 Pow 185. Ch. 184. Doug 733-50. 2 Pow 165-76. Sal 156. 1 Bet K 322. 650. 1 Bl. R. 95. 266. 2 Bl. R. 763. 4 ib 166. So a secret agreet to refund part of a marriage portion it being a fraud on the other party to the marriage. Ch. 184. St. 246. So an agreet to attend the sales of an auction to enhance the price of goods. 1 Pow 186. — — — —

3rd Contracts prohibited by the statute are void. E.g. a Cont. for more than Legal interest is not binding. 1 Pow 188. 1 D. K. 736. So an agreement by a bankrupt to pay money to a creditor for signing his certificate is void by St 5 Geo 2. 1 Pow 189 & Doug 174-96. and indeed would be so at Com L. as fraudulent to the other Creditors. 1 Pow 190-1. Doug 676. 96. —

Contracts are illegal and void when the object of them is the omission of some duty imposed by Law. Thus an agreet by an under Sheriff not to serve process in a particular part of the County or not to levy Exs over a certain amt are void.

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1 Saw 193-6. 11 Co 12 Mod 836. 886. So all contracts that have a tendency to encourage unlawful acts or omissions as a bond to indemnify a printer for publishing a libel 1 Ld Ray 176. The same of a bond to indemnify a sheriff for embezzling a writ or money &c 1 Ld Ray 197-8. Stra 2 Bull 2131. or to save one harmless if he will commit a trespass felony or other wrong 1 Saw 197. 1 Lev 209. 10 Co 100 b. Dy 113. 118. 332. Cro. Car. 333-4. So also a wager between two persons that one of them or a third person shall do a criminal act as it is an indictment & a violation of Law 1 Saw 188-9. There is a distinction between bonds for performance and covenants some of which are lawful and some unlawful. If the latter sort are made unlawful by statute the whole bond is void, but if they are only so at Com Law then the bond will be good as to the covenants that are good and void as to those that are void 1 Saw 199. 2 Wils. 351. 1 Vent 237. Thus if an under sheriff covenants not to take more fees than a certain amount and also to save the Sheriff harmless as to escapes and a bond is given to that effect, it is void as to the former but good as to the latter covenant 1 Saw 199. 200 2 Wil 351. But if the Sheriff takes a general bond against the St. 23 Hen IV. and also for a debt due the whole bond is void. 1 Saw 200 2 Bac 438-9. 1 Vent 237. 2 Wil 351. This distinction arises from the letter and structure of the statutes in such cases and is indeed founded on mere construction.

Although the illegal contract creates no right yet the Law after it has been executed in some instances suffers it to prevail and will not aid either party in rescinding it. 1 Saw 200 1st When the illegality is of such a kind that both parties are deemed criminal and payment has been made the party who has so paid cannot recover back his money for they are in pari delicto and potior est conditio possidentis. Doug 451-68. Sal 131-2. Sal 22. 8 D. H. 578. Cowp 790. 1 B. & P. 299. 2 Esp 102. so also while the cont. remains executory there he may recover back

paid. 1 Pow 202-67. Tal 132. Doug 471. Thus if A. pays money to B. to have him beat C if the battery is not committed the money may be recovered back but it is otherwise if it had been committed. Quere as to the correctness of the doctrine in point of principle for would it not be better in this case to permit a recovery in every instance or not at all. 7 T. R. 535. It has been conceded that money paid over on an illegal wager cannot be recovered back as the parties are in pari delicto. 1 Pow 200-1. Doug 451-68. Bul 131-2. Salk 22 8 T. R 578. Coup 790. 1 B. & P. 298. 2 Burr 1012. But if the money remains in the hands of the stake holder each party may recover back that which he deposited though the wager is decided, as in a betting matter for in such case the winner has no legal claim to the money. 3 Cas. 222. 5 T. R. 405. 4 John 416. Suppose the stake holder should pay over the whole after being forbidden would he be liable La R 89. 5 T. R. 409. 1 B. & P. 297. 1 H. B. 64. 2 Blk R. 1076 2 Wil 369. On principle he is for the winner could not recover it from the stake holder the act was therefore voluntary but the weight of authorities is the other way. Then go on the ground that the cont. is executed. 3 Cas. 222. Under 5t. the loser may recover back in all cases. 5t. Con. 361. And it has been decided that money paid to one of the parties beforehand is recoverable after the event tho. it were in favor of the defendant but this is doubtful 1 Ca 98. 8 T. R. 575. 4 John. 426. So also money paid for the procurement of an office is recoverable before that office is procured. Seems afterwards. So a premium in an illegal policy before and after the risk is run 1 Pow 202-6-7. Secondly. But when the party who has paid the money is not particeps criminis he may recover back tho the cont. is executed. 1 Pow 201-21. So also money paid by a bankrupt or his friends to a creditor for signing his certificate 1 Pow 205. A security given or promise made in consequence of a transaction prohibited by statutes is not of course void. Thus when of two parties one pays the whole loss and takes from the other a

security or promise to pay his share it is good. 4 Bur 2069 2 T.R. 418. 2 W. Blk 394. Stat. 180. 3. T.R. 422. 6 ib 61. 7 ib 360. 2 B. & P. 372-3. so also it has been holden that if it be paid with the privity & consent of the other party tho no security be given or promise made a ratable proportion can be recovered 3 T.R. 418. but this rule has been much shaken and seems indeed virtually overruled 2 W. Blk 379. 6 T.R. 61 + 405. 7 ib 630. 2 B. & P. 242-3. 3 Ves 8. If paid without his consent clearly no recovery can be had. 2 St. B. 379.

If a person makes a cont. which act is made criminal by positive law he may be bound by it thro he can claim nothing under it. Thus it is a statute offence for a Clergyman to trade but if he should do so he would be bound by his agreements for the nation of them is not illegal it is only the act of making that is contrary to law. He is the offender and the object of the law is to subject him to a restraint & not to grant him an immunity & besides he cannot take advantage of his own wrong. And if a man engages in smuggling he is liable as a tradesman to the bankrupt laws. 1 St 196-9. Ch 19.

If the object of a cont. is perfectly useless it is void "cui bono." no valuable end to be obtained thus if a man contracts not to wash his own hands it is void. 1 Pow 131-2 So a cont. which wantonly injures the character or disturbs the peace of another is void. 1 Pow 232. 3 Cruk 729-35. 2 T.R. 696. So a wager which tends to the introduction of indecent evidence is void. 1 Pow 233. 3 T.R. 76.

So certain Lastly a cont. must be certain. 12 Co 180-2 1 Sid. 276. 1 Keb 776. Hob 69. Hence if A promise & deliver goods in consideration of B's promise to pay money in a short time B's promise is said to be void because B's that is the consideration of it is uncertain and therefore void. 1 Bul 72-97. Cro J. 255. But a promise to pay a given sum of money without designating any time is good for it is due immediately. 1 Pow 180 It creates a present debt

7 J. R. 124. 427. and no future time is appointed for payment. Tho if one promises to do a collateral act and no time is appointed he has his whole lifetime to perform it. in. 1 Bow 188 In Certain Cases Honor if I promise to pay A what he pays for me it is sufficiently certain and I am bound.

Of the Subject of Contracts.

Under this division we are to enquire in relation to what subject contracts may be made so as to bind the parties. 1 Bow 152 On this head a distinction is to be observed between cont executed and executory as to what they are see Bac 175. No person can by a cont executed convey any thing in which he has not an actual or potential interest at the time of conveyance for one cannot grant to another what is not his own Thus if A transfers to B. the wool which he shall hereafter buy it is void. 1 Bow 152. Bow 432. Noy 132. Co Litt 39 B. 369 B. So if A lease to B. the land of another Lessee may plead that he had nothing in the land at the time of the Lease. Co Litt in tenementum. 1 Bow 153. Co Litt 41 B. Esp 233. 316. 3 D Sec 146 But if the Lease were made by indenture it would be otherwise for there the Lessee would be estopped. Esp 233. 306. St. 817. 3 Atk 537 If one of two joint tenants grants a deed of Bargain and sale of the whole land and his Covenant afterwards dies the before enrolment the moiety of the latter does not pass. 1 Bow. 165. Bac Max 80 If the deed contains a covenant that the grantee is seised why would not the whole pass by way of estoppel upon the same principle if A sells to B a horse on (Condition) of pay. six months thence, for the property is changed and the sale to another would not be good by B's failure to pay at the time. 1 Bow 154-5. Bow 432. Nor can one grant to another that to which he has only an inchoate title to be perfected at a future time as for exam. a contingent remainder 1 Bow 135. Eq 221. 4 J. R. 428. Though such remainders are devisable descendable and in Eq. assignable. 1 Bonb. 201-9. 3 J. R 88. 1 M. B. 36. 1 J. R. 222. 6 D 5. But that of which one is potentially the owner who or is accessory to something actually vested in him at the time of the bargain may be

disposed of by sale. 1 Pow 156-7 Hal 132. Rights not vested either actually or potentially may be the subject of executory Cont. there being no other than stipulations precedent and preparatory to the act by which the interest is to be conveyed for the one cannot convey what he has not yet he may oblige himself to convey what he may hereafter acquire. Thus A covenants to purchase Black acre and convey it to B. or A authorizes B. to lease the land of which he shall be seised on such a day. In these cases a future act must be done to execute the Cont. 1 Pow 158-9 Bac Max 79. But it is otherwise if no future act is to be done to give effect to the Cont. It must then take effect at all as Cont executed of which a covenant by A to stand seized to the use of B. of the lands which he shall hereafter purchase is an example this operates as a conveyance executed and no future act is necessary. 1 Pow 159. 234. Bac Max 80. 2 Blk 443. It has however been held in Cont. that if one makes a deed with covenants of seisin of lands of which he is not the owner and afterwards purchases the same he is estopped to allege that he had no title. 1 Roll 222. 2 Blk 295. Co Litt 265 and the same rule prevails in Cont as to leases. Salk. 267. Doc Mort 495 2 Kirb 365. Sa Rag. 729. 1048. 1058. 6 Mod 258. Op 300. 238. 3 Jo. 370-1 Mortgages also v. same Doc Mort 97. 2 Ver 11. 1 JR 76 And so likewise the same at com law as to freeholds convey. by deed with the usual covenants 1 Pow 168. 3 JR. 370. Co Litt 265. Litt Sec 466 2 Blk 295. Why then cannot a contingent remainder or executory interest be passed by such a deed by way of estoppel. — — — —

Of the Nature and Kinds of Contracts.

There are either executed or executory. 1 Pow 234. 2 Blk 443. 1st A Cont is said to be executed when the parties to it transfer the interest which one of them has in property together with immediate possession of the same or at least with a right of future possession depending on an event which is certain without either party trusting the other. E.g. 1st Goods sold and [illegible] delivered. 2nd One has lands under a lease and transfers the reversion to another & vest in possession after the determination of the Lease 1 Pow 123-58-9-76. 2 Blk 448. 2d An executory Cont

Contracts

is one which is merely introductory or preparatory to an actual transfer of property as an agreet to exchange horses next week or to give grant sell &c. 2 Bett 443. 1 Pow 234-5. A cont is executory when one performs immediately and trusts the other as in a loan of money on a promise of repayment. and so also it is executory in this case. an agreet to make a loan in consideration of an agreet to pay for it 1 Pow 234. All cont's according to Pow 236 are either express constructive or implicated. but the usual distribution is into express and implied. First An express cont is one in which the parties stipulate in so many words with respect to what is to be done or omitted Pow 236. Secondly Constructive cont's are such as are raised by construction out of the instrument and are different from what it prima facie imports. they vary from the terms of the instrument from which they are raised. 1 Pow 236. Cro Jo 137. 668. Yelv 131-2 Ld Ray 1. Skin 115. This however is but a branch of express cont's being raised by construction from the words used by the parties. A recital in a deed of conveyance respecting the grantors estate amounts by cons. to an agreet that he has title according to recital. Thus.- Whereas J. S. is seised and possessed of Blackacre for years. J. S. agrees that he is so seised and possessed. 1 Pow 237. 1 Leon 122. so also a recital in a marriage settlement that whereas A was to pay a specifick sum has been holden to be a covenant to pay it Pow 238. 2 Freem 57 2 Ch Ca ab 652-8. 1 Leon 117. 1 Rol. R. 102. 11 Co 58 B. An exception in a deed is construed may and to a cont. Thus a lease by indenture of a mine with the exception of a certain close this is a covenant by the lessee that the close shall not pass by the deed. Plow 6. Plow 238-9 Cro E 65. but it is now holden not to amt to a covenant that the lessee will not disturb the lessor in the enjoyment of it for as to the part excepted the lessee is a perfect stranger. if however the thing excepted is to arise out of the thing demised it is a covenant at supra. Thus land is leased with the exception of the right of way or a house with the exception of a right to pass through it. Dell Dunc. unless it may be by indenture Pow 239.

Cont executory when

Cont executory when

Express Cont's what

Implied Cont's what

but as the lessee has an interest in the subject out of which the right of exception is to issue may be not be considered as assisting to the right and if so an indenture is not necessary 1 Leon 224. 1 Bac Ab 531 Carth 232. Sal 196. 1 Mod 170. So a reservation of a rent in a lease "yealding and paying" amounts to a covenant to pay on the part of the lessee 1 Bac Ab 242 2 Bro C. 657. Co Litt 399. Cro Jac 136. 1 Roll 158. 3 Co 57. 4 T 497. 1 Vent 10. So a lease without impeachment of waste gives the lessee the trees growing on the land demised. 1 Bac Ab 243. 2 Bro 132. So if an obligation is endorsed that it shall be void on a certain event in the words of the obligee it is a good condition tho they ought strictly to be the words of the obligor for such appears to be the intention of the parties. 1 Bac Ab 244. 1 Leon 246

Implied and Express Contracts

Strictly. — Implication or implied contracts are those which either are not expressed in terms or raised by and from the words used but which arise by operation of law and of the nature of the agreement. Thus labour is done or goods sold without any express stipulation as to the price but a contract to pay what is reasonable is implied. 1 Bac Ab 245-6. So if one delivers his goods into the custody of another the latter impliedly agrees to take such care of them as the Law requires. 1 Bac Ab 246. So if a Sheriff levies money on an Exn. the Law implies a promise to pay it over to the Plaintiff. If A grants to B. his trees he grants him a right to come on the land and remove them. or if he grants B. land surrounded by his own he grants him a right of way for otherwise the land cannot be enjoyed Bac Ab 126-7. Mar 15. 1 Saund 322. 3 French L. 63. 2 Plk 36. If a lessee holds over he is considered as tenant from year to year. There is a tacit agreement to renew in his favour. In Eq. Contracts are sometimes implied. If a purchaser of land has paid only part and becomes bankrupt the land stands charged with the residue on the ground of an implied agreement. 1 Bac Ab 257 8. 1 Bro Ch. 623-4. 3 Atk 272. Quere if security is taken for the purchase money 1 Bro Ch 420. — — — — —

Contracts are also either absolute or conditional. —

Absolute and Conditional

An absolute contract is one by which a man binds himself unconditionally.

Contracts.

Thus A. in consideration of a Lease covenants and promises to pay rent. or in consideration of money paid promises to deliver a horse or to build a house. 1 Row 206-5. 2nd Fitz 152. A conditional Cont is one the obligation of which depends on some contingency upon which it is to take effect, be defeated enlarged or abridged. 1 Row 259. 2 Fitz 152. Co Litt 201 Thus A contracts to purchase lands on condition that B. returns from India by such a day. The condition suspends the obligation to perform till that day & if he does not return at the time it is annulled. Show K.C. 39. So if A pays B. 100 £ which he holds on condition that he marry C. within a limited time. his right to the money is condit. 1 Row 206. Co Litt 201. If A agrees to give B. as much as B. shall judge it worth an obligation to pay is suspended until B. shall decide its value and then he is absolutely bound to pay. 1 Row 261. Dy 91.

Conditional Conditions

Unlawful Conditions

As to unlawful Conditions.

The effect of these varies according to the matter of the Cont & condition. If an unlawful condition is annexed to an executory Cont the Cont is void. Thus if one is bound in an obligation conditional for the performance of some unlawful act as to kill J.S. to steal &c the bond is void. 1 Row 261. Co Litt 206. Cro 175-82-5 so also if the condition is for the commission of some unlawful act or the omission of some legal duty the whole is void. Cro 175-85. 2 Vent 109. 2 Bac 344. 3 Leo 411. So also if the condition militates against public policy or the general welfare Cro 183-5 1 Bro. 121. 4 Burr 2225. In such cases the Law frees the obligor from the penalty lest he should be under temptation to commit the crime 1 Row 262. But generally if an unlawful condition be annexed to a contract executed the cont is good but the condition void. If one makes a feoffment with a condition that the feoffee should do an unlawful act the estate is absolute. 1 Row 261 2. 2 Bac 187. Co Litt 206-B Hence that the feoffee may be under no temptation to commit the act the Law secures to him the estate without performance of the condn. 1 Row 262. But this rule holds only when both parties are in

pari delicto. for it is otherwise if the feoffor is not particeps criminis
Thus a Mortgage is made to secure usurious interest. the conveyance
is void and the innocent party protected. When the cont. is executory
and the condition unlawful the cont. is of no effect because the Law
will not interpose to enforce it. So also when it is executed if
both parties are criminal the Law will not interfere to defeat it
and in both cases goes on the principle of leaving the parties to themselves
So bonds in restraint of marriage are void the condition being unlawful
Esp 183-4" 4 Burr 2220" So likewise bonds for with-holding evidence
2. Vent 109" Esp 184" 2 Wils 346. So of bonds to become a reward for
prostitution if given beforehand. but if afterward they are valid. In the
former they are inducements in the latter case not. Esp 182" 3 Burr 1360
3 Wils 339. 2 Str 881. 432. All conditions repugnant to the nature of the
Estate are void. Thus if to a feofment in fee a condition of non-
alienation be annexed it is void because it is against Law and the estate
is absolute 1 Pow 262" Co Litt 223 a 2 Vent 233" 2 Show 233. But
a bond or covenant that the feoffee shall not alien is good as that
does not prevent alienation but merely subjects him on his bond or
Estates tail and fee simple. Covenant in case of a breach. Conditions are either possible
or impossible the first need no explanation and as to the second they
are of two kinds. such as are impossible at the time of the cont.
and such as become so by events subsequent. 1 Pow 263-4. If a condition
possible at the time of making it which afterwards becomes impossible
by the act of God, of the Law or the opposite party is annexed
to a cont executed it is not avoided by non performance. Co Litt 206 b
1 Pow 264-5" 444-6" Keys Max 35. Thus there is a feofment with a
condition that the feoffee shall go to London within six months on
the feoffors business. and the feoffee dies within that time, the feoffment
is absolute. 10 Mod 268" 1 Pow 446" Keys 35" 1 Co 98" for the estate
is vested and cannot be divested but by the default of the feoffee. Actus
Dei nemini facit injuriam" So also if the feofment is on condition
of performing a certain voiage and this is prohibited by Stat.

so as to become impossible by act of Law the condition is discharged 1 Row 444. 2 Ves. Jr. 213. Salk 198. 3 Bro P.C. 389. 5 Ib 269. 3 Mod 51. So if a feoffment is made on condition that the feoffee shall within six months marry the feoffor and the latter within that time marries another here the performance is rendered impossible by the act of the party and therefore the estate is absolute.

But if such a condition is annexed to an executory cont. and it becomes impossible by the act of God or of the Law the contract is discharged 1 Row 263. 417. 20. 6 Salk 107. 70. Yelv 209. 6 Lett 206. Doug 669. 1 T.R. 630. 7 Ib 384. 1 H.B. 126. 8.

The rule is the same if it become impossible by the act of the party in whose favor it is made. But it is otherwise if the obligor disables himself to perform the condition for he can not take advantage of his own wrong. 5 Co 21 A. Nor advantage can be taken of the cont. pending till there be some default in the obligor 1 Row 265. Bond with a condition that J. S. shall appear at a certain Court at a given day, who dies in the mean time the obligation is discharged. Thus one cont. to build a house and is forbidden to perform he is not liable on his cont. 1 T.R. 638. 3 Ib 590. 7 Ib 380. Salk 688 Doug 264-5-6-659. Yates 97-9. St 1236. 1 Da 319. 1 B Rep. 53.

If the act of a stranger be made necessary by the terms of the instrument as evidence of compliance with a condition and such stranger arbitrarily refuses is the obligation discharged. 2 Blk 574. 5 Co 23. 7 1. Term 452. 1 Tal. 716. The last was a case of insurance against fire but it was a condition precedent. If the cont. contains a clause making the Ct. judge whether the condition precedent has been complied with the clause is void and the matter is submitted to a Jury 2 Stark 405. If a bond is conditioned for the performance of one of two things and one becomes impossible the obligor is still bound to perform the other unless such impossibility is occasioned by the obligee. Thus if A contracts to convey a house or a piece of land and the former is burnt by Lightning he must

Contract in the alternative.

perform the last branch of the alternative 1 Bl. R. 262 Contra 1 Saw 398
10 Mod 26 2 Co 22 Salk 171 If the condition becomes partially
impossible by the act of God or the law still the obligor must perform
as much as possible. Bond to make a lease for 60 years and a St.
afterwards forbids them to be made for more than 40 years the obligor is
bound to make it for this period. 4 Mo 405 2 Vez 51 Vern 284
Co Litt. 206. F. 382 2 Atk Rep 451 Cum 512 2 Salk 163 581
1 Vent 209-11 3 Bro. P. C. 384 2 T. R. 254 Secondly if a con-
be impossible at the time of making the contract its operation depends
depends on its being precedent or subsequent. A con. precedent is one
which must be performed before the right or estate that depends upon
it can vest or accrue. A con. subsequent is one by which an
estate already vested is to be defeated. 2 Blk 156-7 Co Litt 206.
and this is called a defeasance. Rule. If a condition precedent is
impossible at the time the estate which depends upon it can never
vest. It is void ab initio. For there can be no right till the
performance 1 Saw 206 2 Blk. 267. Co Litt 206. The same law
if the condition was possible at first and afterwards became impossible
so if the condition precedent were unlawful for no right can be acquired
by an unlawful act. 2 Blk 117. But if a condition subsequent
is impossible at the time it is ineffectual and the est. unconditional
Therefore a feoffment on condition that the feoffee go to Rome in a day
the estate absolute 1 Saw 226 2 Blk 156-7 Co Litt 206
so if a bond with the same condition it is simple with defeas
For in the case of a feoffment the estate is vested, and in the case
of a bond the penalty is debitum in presente and a void con. can
cannot affect either 2 Blk 157 So if the con. of a forf. is
unlawful as supra. But in the case of executory con. as
bonds recognizances &c. if the impossible con. be incorp. with
with the body of the obligation the whole is void. for there is
no debitum in presente as there is no distinct part to
create it. 1 Saw 269 1 Sal 172

Contracts

(Of Contracts and agreements required to be written.

A distinction between Contracts written and not written is introduced by the Statute of frauds and perjuries. St 29 Ch. II. 1 Bac 72. 2 Ill 59 1 Vern 269. 2 Blk 1139. By this St. the following Conts will not support an action or suit either at Law or Eq. unless the agreement or some note or memorandum of it be in writing signed by the parties to be charged or by some other person duly authorised 1st A promise by Exrs or Admrs to answer out of their own estate for any debt or duty of the testator. 2nd A promise to answer for the debt default or miscarriage of another. 3rd A promise in consideration of marriage. 4th Sales or Conts for sales of Lands or any interest in the same 5th Contracts not to be performed within one year from the time of making them. 6th A Clause in the Eng. Statute relating to sale of goods of more than £10 value is not material here. Rob 111. 2 St Tr. 63. 7 T.R. 14. By which authority it appears that the Stat extends to executory Conts as to those which are to be executed immediately. By Eng. Stat it is enacted that all parol sales or leases of Land or any interest in them shall operate as leases or estates at will only, with the exception of terms not exceeding 3 years reserving rent of at least two thirds of the improved value Rol 245 l. 1 Bac 724 4 T.R. 681. 3 Br 1c year to year 8 T.R. 3 In Connec all parol leases are invalid. St Con 216.

First as to promise by Exr 2 Ha 1 it has been said that if they have assets their parol promises are binding, since the assets constitute sufficient consideration so that the duty is transfd so as to bind them not in a representative but in a personal capacity. 1 Bes 125. 6 5 T.R. 8. but there is no authority for this T.R. 256. 1 Rob 216. 7 The duty is not transfd and the possession of assets only subjects them as representatives, and besides the Statute cannot proceed upon a distinction between agreemt with and without a consideration St 873. But proof of assets will not raise an implied promise to charge the representative personally tho once he was. Contra 1 T.R. 690. Comp 686. 7 T.R. 351

Ex continued

A submission by an adm^r of a Claime to arbitrament was holden plein to be an admission of assetts 1 T.R. 671. This opinion overruled 5 T.R. 6 & ib. 343. "For an adm^r or Ex^r may be desirous to know of the existence of a claime without ascertaining & naming that he has assetts, but if on such submission the arbitrators award that the Ex^r or Adm^r shall pay a certain sum it is equivalent to finding assetts to that amt. 7 T. R. 453. Once holden that the pay^t of interest was an admission of assetts to pay the principal but this is overruled. 5 T.R. 8. But an acceptance of a bill of exchange by executors who are drawers is an admission of assetts otherwise third persons might be deceived and defrauded. Ck. 82 3 112. 1 H.B. 622. 3 Wils 1. 2 Str. 1260 Barn 1225. 1 T.R. 487. So a transfer by brokers Ex^rs Ck 111-2. 3 Wils 1. 2 Str. 1216. In Eng^d the the Cont be in writing yet the Ex^rs or Adm^r is not bound unless there be a sufficient consideration as forbearance &c, for it is a simple cont only. 7 T.R. 350. Rob 202 1 Vent 26. 1 Ves 126. Str. 873. "For the object is not to make Ex^rs and Adm^rs liable in all cases and at all events when the Cont. is in writing. but in those cases only in which before the Stat he would have been liable on a parol promise 7 T.R. 350. Rob 202 & ut supra and to make an Ex^r or Adm^r personally liable there must have been an existing claim which bound him as representative otherwise there would have been no Consid^n. Rob 206. 2 Saun 136. Cro J. 46-7. the cont. must appear in writing and that from the force and effect of the word 'agreed.' 5 East 10. Rob 116-207-67. 6 East 307. Durnford in Cont every writing containing an agreed is a specialty. To take advantage of the clause there must have been an Ex^r or Adm^r at the time the promise was made Rob 201. Aneb 330. Promise by one in Consideration of being afterwards appointed Ex^r or Adm^r not within the Stat. Not necessary to aver assetts in an action on a promise because the deft is subjected if at all "de bonis propriis" Rob 201-6. ---- Secondly ---- "To answer for the debt

To answer for the debt default or miscarriage of another

default or miscarriage of another ---- Unless this Clause this

general distinction is to be observed. If the promise made for the benefit of another is original it is binding tho by parol but if it is collateral it is otherwise Sa Ray 20 87. Coup 227. 1 Wils 306 Esp 101-2. 3 Bur 1888. In the latter case it is a promise to answer for the debt of another in the former not. N.B. the word collateral is not used in the Stat. A promise is said to be original when the third person for whose benefit it was made is not liable at all so that there was no debt 2d Roll 209. 16. Sea Ev. 42. Rul 281. Bur 1921. - 2d When the liability is extinguished by the promise being made Rol 223. 4. 3d when there is a new consideration arising out of a new and distinct transaction and moving the promisor so that the debt is only the measure of what is to be performed to another object. But when the promise is merely in aid of a subsisting and continuing liability and when the promise only furnishes an additional remedy it is collateral and within the Stat. 2 Lay 451. 3 Mod. 263 1 Wils 306. 2 ib 94. Sd R. 1185-6 Sal 27. Esp 101-2. 1 B & P. 158. 1 H. B. 120. Coup 460. Peak Ev. 112. B.C. A says to a merchant "deliver goods to J. S. and I will pay you", or "Charge them to me" or "deliver them on my acc" the promise is general for J. S. is not liable at all and there is no debt default or miscarriage. 2 T.R. 81. 1 H.B. 120. Sd R. 1087. Rol 209-16. But if he says deliver goods to J. S. and if he does not pay I will the promise is collateral. Coup 227. Note the intent is that the charge should be in the first instance to the receiver and the promise by A. is to pay the debt of another viz. of J. S. and is in aid of his liability & to procure him credit. 1 H.B. 120 Sa R. 1087. Salk 28. Esp 102. So supply my mother with bread &c I will see you paid holden collateral. 2 T.R. 80. 1 Roll 23. Sd R. 224 1 Bos. 118. Salk 28. It was holden that such a promise before the delivery of the property was original there being no liability on the part of the third person Coup 128-9. but it has been since overruled. 2 T.R. 81. Rob 209. but Quere whether the above construction is not correct at any rate it is now holden that when the promise is in this form the Court are at liberty to consider the circumstances of the case and the situation of the parties. 1 B & P. 158. Rob 212-23 So these words if you do not know J. S. you know me and I will see you paid holden collateral & J. S. to be first charged 2 T.R. 80 Esp 101-2. 2 Rob 216-21

Must be original & binding

Else collateral

Statute of Frauds

If a promise by me that in consideration of your letting a horse to J. S. he shall redeliver him is collateral this is an undertaking to answer for the default of another to procure him credit since J. S. is liable on his bailment. Rob 209-32. Salk 27. 3 Salk 15. 6 Mod 26. 2d R. 1085. Holt 686. 1 Bac 735 and it is a general rule that a promise that a third person shall do a particular act for the omission of which he would be liable is collateral 2d R 1085. Secus if he would not be so liable. If A. promise B on sufficient consideration that C. shall pay and if not then he will, this promise is original if C. is not going to it. Rob 223. Gilb 302. So if an agent buys goods at an auction and does not disclose his principal the agent is liable without writing since he contracts for himself. Peak Ev. 213. 3 Bur 1921. To make a promise collateral it is necessary that the party for whose benefit it is made should not only be liable but that his liability should commence with the making of the promise. 2d R. 1085. Rob 219-22-32. and upon the same cons. with him. If the promise is by one of several persons already liable it is not within the Stat for it is not to pay the debt of another. Thus a promise to pay costs by one of two defendants Rob 229. 5 Mod 215-13 Cond 362. 2 Ba 225. 2 Esp 424-84. Where the promise is original "indeb. assumsit" is proper but it is otherwise when collateral here a special consideration is necessary Rob 216. 1 Bur 373. 3 Lev 363. 2d R. 1085. A promise in consideration that the promisee will extinguish a debt against a third person is not within the Stat, for it is not to gain a credit for him or in aid of his continuing liability. Thus have the bond of J. S. & I will pay the debt for him. 3 Bur 1888. 1 N. Rep. 130-1. Sed Quere Rob 223-38. 2 East 325. But Quere whether the former cons is not extinct for the former debt against J. S. is extinguished and the consid is sufficient it being disadvantageous to the promisee. Where the promisor is the purchaser of the debt of another, the case is clearly not within the Stat. Rob 226 2 East 325. 1 N. Rep 156. So as Jones, at supra. The Landlord came to distrain J. S. goods for rent the def to whome they had been assigned promised to pay the rent if he would not distrain. held good tho. J. S. remained liable. The pltff had a lien when he gave up in favor of the def on his promise to pay. 3 Bur 1886. Peak Ev 213. 3 Esp. 225 St. Frauds &c. Sel Ca N. P. 3 Esp. N. P. Cases 86-86 The consid in this case arose out of a new and distinct transaction Rob 232. 3 Esp. Rep. 86. and the debt is only the measure of the sum to be paid. Sal 25. 2d R. 359. 3 Esp. 86. Sal 28 3 Ca. 32 5.

Contracts

Statute of Frauds

When one is under a moral obligation to pay for benefits received by another a parol promise will bind. Medicines furnished to a pauper, the overseers promise to pay the promise is binding 1 Sal 281. Peak Ev. 213. A promise to pay a certain sum in consideration of the withdrawing a suit against J.S. for an assault and battery has been holden original. There was no debt due from him it was not certain that there was a default, at any rate J.S. was never liable to pay the particular sum or to perform the particular duty. 2 Day 457. 1 Mic 305 7 J.R. 204. Rob 218-33-34 Peak Ev 214 There must exist a debt or duty either ascertained or capable of being so at the time of promise to bring the case within the Stat. But a promise to pay on condition of staying a suit against J.S. for debt is collateral, the debt subsists against J.S. and no lien is abandoned by the promise. 2 Wils 94. Bur 1817. 2 H.B. 212. 2 or 7 J.R. 201 And a promise on condition of Plff staying an action of trover against J.S. to pay the damages is collateral, and within the Stat. It is the same duty and the same sum viz the value of the property. 2 Day 455. In Eng. a retraxit disables the Plff from ever bringing another suit on the same cause of action. But in Connt it has no such operation. 3 D. 296. Promise to pay J.S's debt if the Plff will release J.S. taken in mesne process, is collateral for the debt continues and J.S. may be arrested again. Semble if taken on final process as releasing would discharge the debt. 11 Ben 248. 1 J.R. 357. 6 ib 525. 7 ib 421. Rob 37. An opinion in 3 Bur. 1887 & Rob 330-94 contradicted in 2 Wils 94. Rob 232-3 Sal 281-2. 2 Day 417. 7 J.R. 281. Rob 239. 217-8. 7 J.R. 346-58. St. 873. A written promise to pay the debt of another if he does not is discharged by the creditors granting forbearance to the debtor Rob 397. A judicial confession by the deft excluding the necessity of proof will prevent the application of the Stat. as tender pleaded or money paid into Court Rob 238. Peak Rep 15 Peak ev 204 It is not necessary to aver that the promise is in writing as the Stat only introduces a new rule of evidence and not a new rule of pleading. Rob 150. 282 2 Ray 450. Bul 279. 1 Bac 75. 3 Bur 1896. This rule holds as to all Conts contemplated by the Stat. Cowp 289. 2 Root 146. 12 Wend 45. 4 Bac 655. Ergo Demurrer to the declaration confesses a promise in writing 1 Root 77-8. 7 J.R. 355. Quere in Cont as all written Conts containing promises are specialties. Semble if such Cont is pleaded in bar to another action Rob 202. 2 Wils 49. Bul 2 v 579. Ray 460. Greater strictness is required in a plea in bar than in a declaration. But it is necessary in declaring as well as pleading in bar to show the consideration. 7 J.R. 386. Rob 202. A parol Cont. to pay the debt of another and to do some other thing is within the Stat in toto. for if one part of an entire Cont is void the whole is so. There can be no severance 2 Vent 223. 7 J.R. 201 4 Rob 212 & 273 & 231. 1 N. Rep 130.

Contracts. Statute of frauds

Thirdly. Agreements in consideration of marriage.

This clause relates not to promises to marry for them are good tho made by parol Bul. 280. 1 Fonb 179. Ld R. 386. Pr. 34. Rob 190. 1 Ba 61. 411. It includes only agreet in consideration of marriage as family settlements &c. 1 Bow 277-8. 1 P.W. 618. Pre Ch 526. Them to be binding must be written them is no exception but in the case of part performance. It was formerly the that if the parol agreet was made with the stipulation that it should be reduced to writing it was good 1 Bow 279. 1 Ch. Ca. 135 but such stipulation it seems would make no difference & does not take the case out of the Stat. 1 Bow 181. Pre. Ch. 402. 3 At. 104. If however such an agreet is made and the execution of it is prevented by the fraud of either party, and the marriage takes effect Eqr will relieve. 1 Eq. Ca. ab. 19. 1 P.W. 618. Rob 136-7-98 Pre. Ch. 156. and a parol promise or marriage is a sufficient consideration to support a settlement made in pursuance of it afterwards or to support a subsequent promise in writing. Str 236. 2 Ld 146. 1 Bos 196. Rob 197-200. A letter signed by one party is a writing within the statute 1 Fonb 179. 3 At 503. 2 Bro. Ch. 32. 3 ib 318. 1 Bos & P 330. 1 Bow 287-8. 2 Bunb 561. Pre. Ch. 560. Rob 105-90-1. But it must appear that the other party accepted the terms contained in the letter and acted in contemplation of them in proceeding to marry, seems it is not binding. Thus when the party to whom the letter was sent was ignorant of the contents of it at the time of the marriage. 9 Mod 3 1 Fonb 179. 2 P.W. 65. 1 Bow 187-90 Rob 107-8 192-3. Fonb 193. A letter written to ones own agent containing the terms of agreet by parol has been holden sufficient. 3 At 503. Rob 121. This tho no written agreet is yet a memorandum of it. Written Evidence 3 At 503. It must contain distinctly the terms of the agreet seems it is uncertain. 1 Fonb 179. Pre. Ch. 560. St. 626. 1 At 12. Rob 106-94. 1 Bow 290 Eq. Ca. ab. 17.

Fourthly. Contracts for the sale of Lands or any interest in them. Rob 89. If a thing annexed to land is sold in contemplation of severance it is not within the statute as trees or crops. Rob 126. 6 Ea 602. Bel N.B. 162. 11 Ea 362. 1 Com. Cont. 74-80- Bak Ca 214. 1 Lev 65. Bul. 282. Ld R. 182 1 B & P 397 and a parol agreet between the owner and occupier that each should have a certain part of the crop is good. 1 B & P 337. for the crop is not considered as land 3 Leg. 476. By the Eng. Statt parol leases for three years or good but this seems to be the case independently of the provisions of this Statute. Trespass. Olive doubted (as under the last head) whether a parol Contt was binding or not if it was part of the agreet that it should be written. 1 Bow 279-83 1 Bert 131-3. 1 Eq. Ca. ab. 19. Now settled that it makes no difference 1 Bow 281-3. 1 P.W. 776. 1 Ves 221. 6 Bro P. 45. 2 Bro. Ch. 535-65. Rob 147 Pre. Ch. 2 or 402. Parol promise to pay for land bought is good 1 Root. 77-8 407-419

Contract — Statute of Frauds

Once decided in Cor. that a parol agreet by the grantor at the time of granting to pay for a difference in the supposed contents was within the Stat. Finch 22. 1 Rep. t. 73. Contra since Day 23. But parol agreets respecting lands are binding in some cases the Stat notwithstanding. And these are such as are provable by parol consistently with the Stat. and the rules of evidence. There is no inherent imbecility in the cont. the difficulty lies in the proof. The Stat. introduces a new rule of evidence to prevent Frauds & Perjuries. when therefore there is no danger of these in enforcing the agreet it is said not to be within the Stat. Thus if on a bill filed for the specific performance the deft confesses on his answer the agreet it is said not to be within the Stat, because there is no danger of Fraud or Perjury in compelling the execution of it. 1 Ves 271-92. 1 Ves 221-441. Pr. Ch. 208-374. 2 As 100-55. 3 id 3. 1 Blk 600. 1 Bro Ch 568. 6 Ves 37-554 if he does not insist on the Stat and at the same time acknowledges that he is clearly bound 1 Rol 156 61 2 Bro. Ch. Ca, 556. 4 Ves 23. Peak Ca 116. And if the Plaintiff alleges a written agreet evidence of a parol one will be good if the Defts. does not object the Stat. Quere. If the Deft admit the Cont and at the same time insists on the Stat, can it be enforced. Rob 139. Pre. Ch. 208-374 P. Ca. 216. 3 Ath. 3. that Chan would decree a performance in such case see 155. 2 Bro. Ch, 508. In 1 Blk Rep. 600 the rule is laid down generally that an agreet confessed is out of the Stat. per Lord Mansfield decreed contra at law that the Deft may confess & insist on the Stat. 2 Wl Blk 63. 6 Ves Jun 348. 2 Rol 238-155. 4 Ves 23. 6 T. R. 3. Rol 160 1 2 Bro. Ch. 363-4. See a case in 2 Bro. Ch. 559 to 69. It remains a questio vexata 1 Font 170. Rol 160. Mitf. 211 Rol 238. If insisting on the Stat takes the case out of the agreet the rule that confession in the answer seems to be arbitrary and groundless & if the Court knowing it to be by parol can enforce it in one case why not in the other. There is the same danger of perjury in both cases. It is also a Question whether a Deft. in Chan is bound to confess or deny an agreet said to have been entered into concerning lands 1 Font 168 70. It is denied by Ld Mans. that he is. 2 Bro Ch 586. Mitf 211 2. Rol 150-7-70. 2 Atk 55. 4 Ves jun 24. Ld Thurlow of a different opinion and says that the only effect of the Stat. is to prevent proof of the agreet allunde. 2 Bro Ch. 567. 1 Font 171. Rol 137. so that if the Deft. deny it the Plff cannot prove it by parol. 6 Ves 139. Lds. Mans & Thurlow. Macclesfield & Hardwick hold the affirmative & Lds. Ross, Eyre, & Eldon the negative who say that compelling the Deft. to answer either against or not is laying him under a temptation to commit perjury. And what thus does not this objection hold equally in every case when the Deft is obliged to confess in Chan.

Perjury by the Defr was not what the Stat. intended to prevent. Besides this objection might be urged against compelling an answer even if the agreet was written, in which case it may clearly be done. If he is bound to confess or deny it seems to follow that his confession would take the case out of the Stat. for if not "cui bono" confess or deny. 1 Vern 171. It has also been holden in Eng that a party to a parol agreet respecting lands shall be bound by it tho he deny it in his answer if a previous confession out of Court can be proved. See 3 Atk 467. 1 Ves 293 But this cannot be law. — — The Statute of Frauds & Perjuries — Parol agreets respecting Lands may be enforced in certain cases when there is no danger of fraud notwithstanding the provisions of the Stat. In particular sales before a master in Chancery have been decided to be exceptions. The Court will place a confidence in its own officers who are perfectly indifferent between parties and who act under the solemnity of an oath. this case therefore not coming within the mischief has been decided to be without the remedy provided by Law. 1 Ves 218 21. 1 Atk 284. 1 Cha. 334. Rob 115. An exception similar to the one above mentioned is the case of an agreet between solicitors in Chan. which is held binding tho made by parol and may be enforced against the respective parties. These cases illustrate the position already mentioned that the Stat. of Frauds & perjuries does not invalidate the agreet but merely precludes the introduction of any other kinds of evidence than those specified in it. — — 3 D Chan. 334. Rob 115. — — — Another Class of cases which constitute exceptions are those which are inferable from facts which can be proved without incurring the danger of perjury. An example of this is the sale of Lands by a Deed absolute, the vendor continues in possession tho, vendee does not enter into any obligation for the purchase money, receives no rent from the vendee the latter on the Contrary paying taxes and interest money. Now all these transactions go to show that the conveyance was intended to be a mortgage and not an absolute conveyance. The Court therefore will receive evidence to substantiate these facts and from them will infer a trust between the parties and will compell the vendee to reconvey upon payment of whatever money may be due to him. Prec Mar. 65. Talbot 60. 3 Woodison 429. 2 Atk 71. 2 Ves 376. Prec Chan 526.

Part performance

In the construction of Stat. it is a rule that an act made to prevent fraud must not be so construed as to furnish facilities for it commission. Hence when one of the parties by refusing to execute an agreet would be guilty of a greater fraud than that which is essential to the refusal itself, the Case in the above principle is considered an exception. 1 Ves. 171-2. 1 Ves 294-5-6. Ves 131. 1 Bik 600. An example of this is entry or part-performance of the parol Contr. as where A. leases to B. Lands for the term of 20 years, the latter enters at the request or with the consent of the former and incurs expense in buildings or repairs, then A turns round and evicts him or attempts to do it. Here the Court will interpose and prevent A. from

sheltering himself under the Stat. to commit the very mischief which it was enacted to prevent. 3 Ves jun 378-7- 341. 3 Atk. 100. 2 Ver 373. 6 g. j. 1 Ves 221 Stat 783. 1 Vern 172. 9 Mod 37. Pres. Chan. 561. 1 P. Chan 417. 1 P & P. 397. With respect to what constitutes a part performance it is determined that the delivery of possession is sufficient as to the vendor. 2 Ver 163-453. 2 P.C. 48. Stat 783. 3 Brown Ch 419. P.C 318. 6 P.C. 102-7 & 144. So between the payment of the purchase money has been held to prevent the operation of the Stat. on the part of the vendee. This decision however has not been entirely acquiesced in but the current of authorities tends to support it. 3 Atk 2. 1 Ves. 83-222. 4 B. j. 720. 1 Bac 64. 1 Vern 304-5. Rob 153-5. 2 P.C. 46. 9 B. j. 234. Sug. 74-81 Ann. 82. Earnest will not take the case out of the Stat for it is in truth but a pure solemnity, a manner of entering into the agreet and cannot in any sense be said to be in execution or part performance of the Cont. Pres Ch. 560. 1 Vern 175. It has been made a question whether the receipt of the money the payment of which is to constitute the part performance may be proved by parol. That it may is evident from the consideration that a contra. determination would render altogether nugatory the decisions on this subject. For if the receipt mentioned the Cont. and the terms of it then there would be a memorandum in writing agreeably to the requisition of the act, if it did not then parol evidence must be introduced to show what that agreet was. and the payment of the money is a distinct substantive and independent fact which has no necessary connexion with it. This therefore does not therefore come within the proviso of the Law & does not require written evidence to substantiate it. Vern 317 &. Rob 183-4. 3 Atk 1. The act on which the party relies in claiming the aid of the Court to carry into execution a parol agreet must be of such a nature as to be prejudical to him. it must not leave him in such a state that he would not have probably performed it whether he had entered into the cont. or not. 6 P.P.C. 43. 7 B. j. 341. Rob 162-178. A agrees with B his Landlord for a new lease which cont. is not in writing. A continues in possession after the termination of the first lease. this is not a part performance for it is not an act which the party does solely with a view of carrying into effect an agreement. 1 Vern 309. 3 Atk 4. 3 B. j. 378. Rob 586. Pres. Ch. 561. 1 P. Ch. 412. 1 Atk. 12. Marriage is not an act of part performance otherwise there is no possible case that could occur that would not be put beyond the operation of the Stat. It would in effect repeal that clause of the Stat which respects agreets entered into in consideration of marriage. P. Ch 561. Str 378. 1 P. Wms 618. Rob 196 & 1 Vern 309. But as to third persons the case is different and may very consistently with the reason and spirit of the Law be made a case of part performance and therefore an exception to it. 2 Ver 373.

That is it?

Marriage not part performance

Contracts — Statute of Frauds & Perjuries

1 Vern 297-8-309. In Eq. there has been contradictory decesions with regard to the payment of money but of late the Courts have inclined to adopt the Eng. Law on the subject. 2 Day 225. So far have Judges gone in giving a liberal construction to this Stat that they have even admitted parol evidence in contradiction to written testimony when the scope and effect of it was the prevention of Frauds. A. executes an absolute Deed to B under an agreet that B shall execute a defeasance to A the parties intending a mortgage, this he after having received the absolute Deed refuses to do. Parol parol evidence is admissible to show the terms of that Cont. And B. can be compelled to reconvey the land in pursuance of the defeasance which he should have executed 3 Atk 389. 1 Vern 188. 1 P. Wms 620. 2 Atk 203. 1 Ch. Ca 26. 3 Atk 399. Parol agreets may be proved when they are merely inducements to actions for fraud. 2 Day 531.

The Stat. of 2 Geo II gives an act. of Sach. assumps on the implied promise to pay for the use and improvement of Lands. If there is an express agreet it may be given in evidence with a view to ascertain the damages. 8 T.R. 356. 2 Blk. R. 1269. 1 T.R. 378. 1 Wils. 311. 1 H. Blk. 253. Esp. Dig. 21-165. 4 Day 228.

In Cont. we have no such Stat. as the above but its provisions have been adopted. Assumpsit will not lie at Com. Law for rent but the appropriate remedy is Debt. Esp. Dig. 2. Peak. Ev. 24. Bull. N.P. 179. 3 Woods 182. Co. Ji 398-414. Co. C. 242. Hob 264. Stat. 514.

5th Sach. not to be performed in a year from making

5th The next Clause of the act respects agreets not to be performed within a year, and here parol evidence is not admissible. It has however been decided that this clause does not extend to lands & Tenements. This construction however is superfluous as no agreet respecting them would be good without note or memorandum. Ver 159. 8 T.R. 327. 1 Ves 76.

What making an executory contract

But if the Cont. is to take effect on some contingency which may or may not take place within a year it is good. As if A agrees to pay a sum of money on the return of a Ship from sea. Salk 281. Bull. N.P. 280. 3 Burr 1278. Stat. 506. 3 Salk 9. 2d Ray. 316-673. P. Co. 214. So if A agrees to convey Lands or do any other act on his marriage with B. or that his heirs shall pay money at his death the Cont may be enforced notwithstanding the Stat. In order to render these parol Conts good there is no necessity that the contingency should happen within a year for these agreets are either good or bad ab initio and their validity cannot be at all affected by subsequent events 3 Burr 1281. 2d R. 317. Hence it appears that the act extends only to such Conts as by the express terms of them are not to be performed within a year. 3 Burr 1281. P. Ca. 214. It has been further decided that when the promise is to be performed on the completion of a continueing or

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accruing consideration or within one year thereafter it is not within the Stat. As if a Father promises by parol to pay for the board of his Son for four years at the end of that time the agreᵗ is good. So likewise if he agrees to pay within six years, but if the time limited be seven or more years the Contᵗ is not valid. This is the Law in Conn. on this subject there being no Conn. Decisions. 1 Root 89.

Gen. Rules

Having made some general observations on each particular clause of this Law I shall now proceed to lay down those rules which are applicable indiscriminately to all and. first. The construction of this Stat. and of indeed of every other is precisely the same both at Eq. and Law. The remedy or relief may yet be different. 1 Vent 2 22. 3 Atk 486. And here the enquiry arises what is that agreᵗ in writing or note or memorandum contemplated by the act. The answer is any instrument in writing which was intended by the parties to furnish evidence of the Contᵗ In pursuance of this it has been decided that a letter containing the terms of the agreᵗ is sufficient note or memorandum. 1 Ves 179. 2 J. Ch. 32. 3 P. Wms 314. 3 Atk 383. 1 Ves 201. 2 P. 222. A note or memorandum may be made certain by reference to some other document or case to extrinsick facts but there that reference must be express. E. g. If A contᵗ to convey to B land described in a particular deed or B agrees to give the same price that P. P. gave now parol proof may be admitted in the latter case to show what that price was & in the former the deed referred to may itself be produced to ascertain the terms which was the subject of the agreement. 3 P. Wms. Ch. 318. 1 B. & P. 336. 2 B & P 238. Rob 107–15. But if the terms of the agreement are not made certain by the reference no parol testimony is admissable. 1 B. & P. 326. Rob 108 n. An advertisement is sufficient note or memorandum. It must indeed be proved that it was published by the one whose name is subjoined but parol testimony is admissable for this 2 Atk 399. 3 Bur 1921. Kirby 114. It has been held that it is requisite to the validity of such agreᵗ that the Consideration appear in writing since it is an essential part of such agreᵗ; a construction warranted by the phraseology of the Law 5 Est 11. Ca 307. Rob 116-207. To this rule there is an exception under the last clause of the Stat. for wages which will appear on the face of it. 6 Mod. 307. Rob 117. An instrument intended as a deed but failing to operate as such is considered in Eq. an agreᵗ or evidence of one. As if in this State one should execute a deed with only one witness or without acknowledgement before a magistrate. Here the instrument wanting the legal solemnities is void but may notwithstanding be used as a note or memorandum so as to answer the requirements of the Stat. So likewise if a man should execute a bond to his intended wife, it would be void by the marriage.

but might yet be used for the same purpose as the Deed in the last case. 2 Atk. 242. Ante 109. Every Ct. imports the privity and assent of the parties, & therefor a mere entry by a Clerk of the terms of it is sufficient to satisfy the Act. 1 Ath. 494. Ante 109.

The next enquiry is what is a sufficient signing within the Stat. With respect to which it has been decided that an actual signing is not necessary but if the name is found in any part of the instrument with a view to give authenticity to it, it is sufficient. Thus to give a common example if an instrument begins I. M. it is equally effectual as if the name had been subscribed in the usual form. Stat 399. La. Ray. 1376. 3 Lev 1-56. 9 Vin. 249. 2 B. & P. 238. But the name must be inserted with a view to give authenticity for if casually inserted the writing will be invalid as in the case of giving instructions to a Scrivener 1 Ch. Ca. 77. 1 Vern 285. 1 Ves 166-7. There was formerly some slenderness in this subject and it was even held that the mere alteration of a writing with ones own hand was equivalent to a signature. But this decision has been since overruled. 1 Ves 228. 1 Ves. 165. 1 Ch. Ca. 77. 1 Vern 284. It has likewise been decided that a subscribing witness who knows the contents of an instrument is bound to perform every thing that may be stipulated with respect to himself As when a Mother witnessed a marriage settlement which contained a stipulation that she should pay a portion of £10. 2 Vern 313. 1 Ves. 6. 1 Vern 284.

We now proceed to ascertain who must sign. And by reference to the law we shall find that it is either the party himself or his authorized agent. The signature of both is not absolutely necessary. The name of the one against whom it is to be enforced is sufficient if the agreement of the other can be proved. 1 Sch. & Le. 364. 9 Ves. 351. 2 Ves 373. 1 P. C. C. 26. 2 B. 32. 7 Ves. 265

It has been said that both are bound but the reasoning in support of this position is unsatisfactory. If indeed the party not signing brings a bill to enforce the Agt. he is bound for a Court of Eq. will interfere on no other terms than that he will perform the agreement on his part. The very act of bringing the bill recognizes and affirms it. 1 Ves. 82. Ante 124 1 Ves 289. 1 Ch. Ca. 21. It is held that if an auctioneer signs the name of the highest bidder to the conditions of sale it is a sufficient compliance with the requisition of the law or in other words, that it binds both parties. 1 Bk Rep. 599. 3 Burr 1921. 1 W. Bl. 486. This doctrine has however been questioned 8. T. R. 151. but is undoubtedly correct if considered solely with reference to the last Clause of the Act. 1 Esp. Rep. 107. 1 B. & P. 356. 9 Ves. 249. It has been doubted whether sales at auction are within the Stat or not of the notoriety of the transaction but this doubt is not well supported either by authority or the received rules of construction. 1 Atk 603. 3 Burr 1921. Dall. Ch. 80. A printed signature is good upon producing the proper proof that it was authorized 2 B & P 238. Ante 124. The authority of an agent who has signed an instrument need not be in writing, it is not required by Stat. and remains precisely the same as at Com. Law. 3 Wood 382. 9 Ves. 251. Ken. Dig. Cont. 1145. It is not necessary that the identical writing be signed by the parties, it is enough if there be some acknowledgment of the instrument under their hands. 5 Bac. Abr. 3. 4. 363. Ante 121.

The Consideration of a Cont. The materiality of a consideration is evident from the definition

Consideration of an agreement. A Consid.n is the moving cause of the Cont. or that an acct of which each party gives his assent to it as that the Con of a sale of goods which the vendor agrees to deliver and for which the vendee agrees to pay the price. Here the goods & the price are respectively the inducements which move the parties to enter into the agreement. 2 Blk Com. 443-4. 1 Fon 391.

The two Consid.ns Considerations as known to the Common Law are of two kinds first those which are called good & secondly those termed Valuable 1st A good Consideration is that of kindred or the natural affection which subsists between near relations.

1st A good Consid.n what 2 Blk Com 297-446. 3 Co 83. 1 Fon 337. 1 Ves 361. In Contracts executed this first Consideration is sufficient between the parties, but not so as to Creditors or bona fide purchasers. As if a Father should convey a piece of land to his Son here the Cont. would be executed and natural affection would support it between Father & Son. But if the Father were indebted at the time or if he afterward sold to a bona fide purchaser the title of the Son would be set aside in favor of the Creditor in the first case or of the purchaser in the last. 2 Blk Com 297. And even in executory Cont may be sometimes enforced in Eq. where the consideration is merely a good one 1 Ves 46.

2d Valuable Consid.n 2 Ves 156 Secondly a Valuable Consid.n consists in something that has a pecuniary value as money goods or lands & even Marriage 3 Co 83.

So likewise Suretyship is a valuable Consid.n since it is either procures or prolongs the Credit of the principal and will support either an express Cont. to pay money or the implied agreement to indemnify the surety 1 Ves 482.

With a view to this subject it will be necessary to refer to the distinction between special and simple Cont into which two kinds they are all divided 7 T.R. 351.

A special Cont is one which is a deed or some writing under seal. A simple Contract is one which is made by parol or by writing without a seal. It is the seal or the want of it which constitutes this distinction. The writing adds nothing to the agreement. but in point of solemnity it is on the same footing as if made by parol, or by writing unaccompanied with a seal. The writing is only produced as evidence & that it has no other efficacy is evident from the fact that it is never relied upon in a declaration 7 T.R. 351. 2 Blk Com 465-6. Tot 99

In Com. written instruments whether sealed or not are regarded as specialties as to their express stipulations. & Eng. Law is considered applicable as such. The extent of this rule is not however fully ascertained see 1 Swift 373. An executory simple Cont is not binding without a consideration. They are termed nuda pacta & ex nudo pacto non oritur actio. E.G. If A agrees to make a present to B. the Cont. is not binding the municipal law will not enforce it although perhaps in the nature of things there is no reason why it should not be valid. The obligation is similar to the one that we are under to be charitable which is called an imperfect obligation the performance of which the law will never enforce. 2 Blk 445. Salk 129. Show 302-9. 1 Fon 326-333. 5 T.R. 142.

What are Instruments under Seal Cont

Contracts.— Of the Consideration

It has been laid down by judges Wilson & Blackstone that a cont which is reduced to writing is good although without a Consid^n 3 Burr 1670. 2 Blk 666. But this proposition is too broad the example of a note was adduced to support it but this rather proves the contrary, for in note not negotiable the consid^n is always a subject of inquiry, and in those which are so this requisite cannot be dispensed with between the original parties i.e. the drawer & payee. It is indeed true that between parties not original as drawer & endorser it is immaterial whether there was a consid^n or not but this is owing to the negotiability of the instrument and may be referred to a principle of the Law Merc. which in this respect differs from the Com. Law. 7 T R. 121-357. on bills 155. 3 T.R. 421-755. 2 id 741. 1 Ton. 333. 1 Bow 341. 2 B. 242. In strictness of Law a consid^n is always necess.^y whether the Cont. is of special or simple as in the example of a penal bond where a consid^n is supposed. The Deft is not indeed obliged to prove it nor can the Deft deny it but the virtue & the efficacy of its seal denies a consid^n which presumption cannot be rebutted. In the language of the Law the Dep. is estopped from denying his own deed. 1 Ves 514. 3 Burr 1637. 1 Ton 334. 2 Blk 446 La Ray 729-1550. 1 Bow 344. 2 T.R. 577.

On principle therefore a consid^n is requisite to the validity of all agree^ts. But this rule in its fullest extent reaches executory Conts. only it does not invalidate the agree^t but only amounts to this that the Law will not enforce it. If the parties have already executed it, if they have already carried it into effect the Court will not ~~Court will not~~ interfere at all, or in other words the Cont. is good between the parties themselves. Doug 20-1. Stat 955. 1 Fac 238. Cap. Dig 577

It has been said that a consid^n can only arise in two ways 1st when the thing stipulated is advantageous to the promisor & 2d^y When it is disadvantageous to the promisee, 1 Ton. 336 Cont 29-4. An example of the first is where A purchases goods of B which are delivered to him & he stipulates to pay the price. Here the delivery the consid^n is advantageous to the promisor. The quantum of the price is altogether immaterial unless indeed it be so inadequate as to be evidence of fraud. The Law does not regard proportions it is sufficient if the Consid^n is of any value, 1 Wils. 235. 2 V 515. 2 Ver 213. 2 Ton 152. But an idle & insignificant consid^n is not regarded 2 Lev 23. Cro E. 206. Esp Dig. 94. 1 Ow 355. But any thing however trifling provided it be not idle & insignificant to be done by him to whome the promise is made, as merely showing base by lessor to lessee. Cro E. 67-155. Cro. C. 70. Dy 272. 1 Bow 343. It has been decided that the relation of Landlord & Tenant is a sufficient consid^n 3 T.R. 373. — A holds a bond against B. & C. stipulates that he will pay to A the amt. of it if he will give it up to B. Here the thing stipulated is disadvantageous to A the promisor & is an example of the second way in which a consid^n may arise. Hob 4-5 Cro J. 342. Cro C. 745-849-81. Cow 128. Hob. 216.

From the rule last laid down it follows that when the consid^n is part executed

it will not support a contract. As if A bails my servant & afterwards I promise to pay him a sum of money. Here is no debt or duty no legal liability for the promise being subsequent is not the procuring cause of the consid⁻ & therefore the Cont. being without this requisite is not valid. Plow 5. 302. Po C. 741 885. 2 Salk. 73. 1 Ro 11. But where the consid⁻ is not altogether past service that it may be partially so it will be sufficient. As when a lessee promised to indemnify & save harmless a lessee in consid⁻ of his being his tenant & having occupied his lands. Here the Cont. was held good because the parties evidently regarded not only to his past but also his future occupation of the lands. Po C. 94. Po C. 409. 2 Salk 173. 3 Salk 96.

But the rule as laid down is too narrow for in certain cases a consid⁻ past & executed will support a Cont. The first class of cases which arises under this observation are those in which there was a prior legal obligation incumbent on the promisor as when A agreed to pay B. the expences which he had incurred in burying the child of A. which was a duty imposed on parents by Stat. Wheeler & Child Liabs. 1 Rol. 44. 1 Leon 198. 2 Ray 1260 Po C. 138. 3 Burr 1671 And it has also been decided that not only a previous legal but also a prior moral obligation was suffi. consid⁻ as a promise to pay a debt barred by the Stat. of Limitations. 1 Lon 336. 2 Ray 1259. 2 Ld Ray 1445. Cow 290-4 B. N. P. 147. 1 Lon 351. So also a promise by the putative Father to pay for the nursing of his natural child is good. 2 Eas 506. If the past consid⁻ accrued at the request of the promisor it will support the Cont. for the promise the subsequent couples itself with the previous request and by legal relation has the same efficacy as if made before performance on the part of the promisee. 2 Vent 268. 3 Salk 96. Hob 105. Po Jo. 18. Po C. 409. 1 Lon 336. Po C. 42-282. A man stranger cannot maintain an action on a Cont. which contains stipulations in his favor. nor can he rely on the meretricious act of one of the parties as the consid⁻ of the agreement for here is advantageous to the promisor or disadvantageous to the promisee. As if A. in consid⁻ that B will acquit him of a trespass promises to pay C a sum of money C cannot maintain an action against A on failure of payment. Po Jo. 687. 2 Bac 447 597. 1 Lent 6. 8 T. R. 330. Chitty on Bills 220. but this rule has been much relaxed and indeed is confined to acts between the parties. 3 B. & P. 118. 3 Leo 139 Cas. 77. Po C. 729. 1 Leo 235. 1 B. & P. 101-2. Cow 443. 3 T. R. 35 6. 5 Burr 2680 1 T. R. 659. In a past agreement the third person for whose benefit the promise was made may maintain an action 3 B. & P. 148. 1 B. & P. 101-2. 8 Mod 117. 1 John. 145 for the third person in effect ratifies the Cont. by his subsequent assent & this is analagous to the case of agent & principal where one enters into an agreement for & on behalf of the other without his previous knowledge, here the

principal has a right to accept & confirm the cont. of his agent & maintain an action on non fulfilment. This third person is in fact considered an original party to the pact cont. But this is impossible in the case of a specialty on acct of the solemnity of the instrument which does not admit of a third persons bringing an action in his own name and declaring as if the promise was made to himself. 13 J. R. 181. When there is a near relation subsisting between the third person & one of the parties the rule under description has never applied as when a rich man promised to pay the daughter of a physician a sum of money provided the father should succeed in effecting a cure. But this distinction is altogether arbitrary, for the law recognises no difference between strangers & near relations. Cowel Court 318-32. 2 Lev 210. Ray 302. 1 Vow 153. Forbearance of action is a frequent consid of cont to the sufficiency of which there are two requisites. First that the forbearance must be either perpetual or for a limited time. Secondly. The party must be chargable or at least there must be a colour of liability. Cro E 206. Ca. Dig. 95. 1 Com 393-4 A. promises to pay a debt in consid of forbearance without any limitation of time or any stipulation that it shall be perpetual A is not bound by the cont for the creditor may delay but 5 seconds & it would be forbearance & a compliance with the terms of the agreet and therefore the consid is frivolous. But a promise to delay one year or a reasonable time will be suff. for in the latter case it will be submitted to the court whether the time was reasonable or not. Cro E. 485. 1 Hob. 108. Es. Dig 95 1 Vow 353-4. The next requisite is that the party should be at least chargable or at least subject to a colourable liability. As when the mother promised to pay the debt of her son in consid of forbearance to sue him. She was held not liable. 1 Str 73. 3 Sal 96. 1 Vow 334-5. So a promise to pay a sum of money for the discharge of one who is arrested on void process. is not valid. Here is no consid the arrest is false imprisonment & wrong moment the prisoner is acquitted it is a violation of law. R. Dig 94. 1 Str 73. & See page 46. The third class are those which are termed mutual and independent promises. where the engagements on each side are reciprocally the consid of each other. In this class of cases performance is not a condition precedent on either side. no averment thereof is necessary & as the case may be. cross actions may with respect to the same subject matter may subsist at the same time. as in consid of your promise to build me a house I agree to pay you a sum of money or vice versa. you engage to build me a house in consid of my promise to pay. 1 Brut 117. 214 Hob 85. 1 Lev 293. 3 Bulst 187. Salk 24. This last distinction is not observed in Eq. Performance must be averred or a readiness to perform or the bill will be demurrable. This is not because the construction of the cont is different in the two courts but it is founded on this principle that the interposition of Chan. is always discretionary. The neglect of the party to have the claim enforced on one side while it is not performed on

The other is not correct on considerations and it is a maxim that he who would have Eq. must do Eq. Therefore the Court will make the fulfilment of the Con. on the part of the petitioner a condition of relief. Besides this decision is justified on the ground of preventing a multiplicity of suits. Courts of Eq. never interfering to decide one limb of a controversy while they leave the other undetermined. 1 Fon 383. Fraser 405. Treat 35. 7 B.P.C. 186. When the promise is in this form I will pay you so much money you transferring to me Stock or vice versa you promise to transfer stock I paying the money. the Cont. has been said to be independent. ~~Conditional.~~ but incorrectly for the intention of the parties which is the rule of construction plainly shows it to be dependent and conditional. Salk 112. 2 Holt. 663. 1 Fon 382. 12 Mod 303. 2 H Blk 270. 4 T R 761. 8 S 372-5.

The combinations of Language are various and the forms of phraseology in Cont extremely different. But the question whether they are dependent or concurrent or independant is governed by the spirit & nature of the agreet & the order in which the intention of the parties requires performance & not by the order in which the stipulations are recited in the instrument. Doug 665. 1 T R 645. 7 S. 130. 6 S. 370. 668. 8 id 373. 1 Sum 320 a. 2 N R 248 a. Of late the Eng. Courts have leaned against construing the promises independent 6 T. R. 761. 8 371. Wolf 496. 1 Ct. 619.

Mutual promises must both be binding or neither will be so. There must be a reciprocity & mutuality in the Cont. This rule only imports that the obligation of the agreet on both parties must appear on the face of it & not that both are absolutely liable for in the case of Conts with infants the one is bound the other not. Salk 24. Hob 88. 1 Fon 360. The merely delivering property to another on his undertaking to do some act respecting it is a sufficient consid. tho that act be gratuitous as if A pay money to B under the agreet. with part of B to pay it over to C. here if B refuse to fulfil the Cont and to pay the money to C he is liable to A. This rule is necessary to the preservation of common honesty. But the case would be different if there were no actual delivery of the property. it would be a mere nudum pactum. a Cont without any consid. to support it. La R. 909. 10-19-20. Co L. 167. 1 T R. 143. Salk 26 3 Salk 11. So likewise the preservation of the peace or the honor of a family has been held in Chan. a sufficient consid. as when the elder son was an illegitimate child & the father with a view to prevent a discovery of this fact & cut off all source of controversy among his children caused them to come into an agreet. which for the reason above was held valid. 1 Atk 10. 1 Ber 4. 2 Vent 355. 2 B 284. 1 Atk 3. 1 Fon 362.

Likewise the compromise of a doubtful right to put an end to litigation is a good consid. It is not necessary that the consid be expressed in direct terms eo nomine but it is enough that it may be collected from the

Contracts — The Consideration

whole complexion of the agreemt. Its principle is recognized as to Penn
1 P. C. 450-368. At Com Law fraud in the consid. of a cont. by specialty does not
invalidate it but in the execution it does for in the former case the party is estopped
from averring any thing in opposition to his deed. A sells to B an unsound
horse for the Price of which B executes a bond to A. on this fraud in the
consid. B cannot rely as a defence in action on the bond but must take his
remedy by way of action on the case for the cheat. In the latter case viz.
fraud in the execution the agreemt contained in the instrument is not in fact
assented to by the party as in a case of misrecital which may always be proved
like duress or any other fact affecting its validity. 2 Blk Com 304. 2 Bac 594
2 Co 3-9. 11 Co 27. 2 Lev 422
But a Court of Eq. will relieve not only in cases of fraud in the execution but
also in those of fraud in the consideration & even when it is merely partial &
not total. The reason of this difference is that a Court of Law must express
a cont. in toto or not at all, but Eq. may adapt its rules to the justice of the
case. 2 P. W. 203. 3 A. 290. 2 Pow 145. The rule was formerly the same
in Courts executing the the solemnity of a specialty did not interpose P. Co 233
1 Cam 39. 4 Co. 95. 2 Swift 169. In case of simple conts it has been much
relaxed or rather it does not apply at all for fraud in the consid. may
be averred, and the effect will be to mitigate the damages when it is partial &
to defeat the action when it is total 1 Cam 39. 190. 4 8 John. 453.
In Com. a total fraud in the consid. of a specialty is as good defence at law
1 Root 58-305. But if the fraud is only partial there is no relief but in Eqr.

The interpretation of Contracts.

The next subject of enquiry is the interpretation of Conts. the object of
which is to ascertain the intention of the parties. at which object we should
rest in the construction coming up to it in the one case coming up & not passing
beyond it in the other. 1 Pow 370-1-2. Words are to be understood in their most
popular & known sense unless there be some substantial reason for adopting a
different signification. Plow 109. Pop. 55. Blk 213. Thus it is a settled rule
that if A agrees to buy of B 20 bbls of ale he is not entitled to the barrels themselves
but only to the liquor which they contain. which is warranted by the practice of trade.
but if on the contrary he buys 20 pipes of wine he may have the casks as well as liquor
which is warranted by a similar usage. Plow 86- 1 Pow 345. Words
expressive of quantity or measure are construed according to the usage of the
place where they are spoken. as in the case of a bushel which in different
places is of a different capacity. but money is to be construed according to
the denominations of the place where payable as for ex. a thousand £ due
in London from Com. would be considered a thousand £ Stg & not lawful

Contracts. Of the Construction

2 Vern 86. 690. 1 Vern 376 607. Where the language is ambiguous the intention of the parties may be inferred from the subject ~~the parties~~ the effect & the circumstances. First reference is to be had to the subject of the Cont. as in the case of a clause of warranty contained in a deed which has never been extended to covenants entries, but confined to eviction under colour of higher title for the manifest intention of the grantor was to give and of the grantee to acquire a good title, and not to stipulate that the former should defend the latter against the wrongful acts of mere strangers. Cro J. 425. Cro C 212. St 600. 4 Co 80. 4 TR 619. 3 Ld. 58. 8 Co 91. Hob 34. So also from necessity that an instrument may take effect rather than fail an instrument may operate as if it were of a different form and species. as in the case of the enlargement of one joint tenant by another which has always been considered in substance a release although not so in form. A feoffment cannot be executed between the parties since the grantee as well as the grantor is in possession & therefore there can be no corporeal investiture. Hence it follows that if you consider the instrument a feoffment it would have no operation but as a release it would & accomplish the intention of the parties. Ray 187. 2 Saun 96 Cro E. 352. Salk 574. 3 Salk 298. 1 TR. 446. On the same principle a Deed may operate as a will or devise an example of which is a grant to commence in futuro. altho' secus.

2dly In construction the effects & consequences are to be taken into consid^n as when the words taken in their ordinary signification would be altogether vain and ~~"~~ words this will justify a variation from such ordinary significations & the adoption of a meaning better calculated to attain the object of the parties. 3 Vern 211. 2 Blk 1155. Cro E. 205. If an annuity is granted for instructing one Children it has been decided to be conditional although drawn in absolute terms. Roy 14. 3dly The circumstances are likewise to be taken into a^ct in the explanation of a doubtful Cont. Thus if a Grants an annuity to B for Council it is understood to be for professional council, or if an Ex^r having personal property of his own conveys all his goods it extends only to those which he holds in his individual capacity. 3 Wood 278. 1 Vern 355. Litt Sec 535-6-7 Cro E. 705. So likewise a release containing a recital of some particular claim & followed by general words the generality of the former is ~~qualified~~ & restrained by the particularity of the former. A released to B a legacy which he owes as Ex^r for 5 £ which is also expressed to be in full of all demands. These last words although general will not preclude A from instituting a suit and recovering on any other demand arise from the legacy which he may have against B. 3 Eq. Ca. 170. 3 Mod 274. Cro J. 170. Salk 235. 4 Bac 190. 1 Vern 391-2. But if in the receipt of a particular sum no claim is mentioned the general

words will have their full effect. Dyer 155a 3 Mod 247. Cro Eliz 119. 2 Ro 409. But when after the application of all these rules of construction the intention remains doubtfull the words are to be taken most strongly against the person bound for it is his language & if it is ambiguous it is his own folly. 9 Co 7 b. 1 Bow 140-161-171 289. 1 Inst 197 a. 276 b. But in the case of a penal bond if there is any ambiguity in the condition it is to be construed most favorably for the obligor for such condition was intended for his benefit & besides the exception operates to his discharge a penalty which is always obnoxious in law 2 Lg. 117. 5 Co 22-3. 10 Bac 397. If one is bound in a penal bond to make an estate in pursuance of the advice of A.B. & declines & the estate is to make the penalty is saved saying out of the question the sufficiency & legality of it. both of which being required by the terms of the agreement 5 Co 23 b. Perk Sec. 777. There is also another exception to the general rule viz when the application of it would or might occasion an injury to third persons thus if tenant in tail makes a lease for life it is taken to be the life of the lessor and not of lessee since the latter if the lessor should die first would affect the interest of the issue in tail. 1 Inst. 42. 1 Bow 400. Subject to these rules words are to be taken in the most extensive sense in which they are usually understood. Thus a warranty against all men is a warranty against all persons. 1 Bow 401. When legal words are used in a Contract they are to be construed according to their legal meaning and phrases according to their technical meaning 2 Rol 253. 1 Bow 402. Thus if an estate be limited to A for life as long as he shall pay a stipulated sum & to his heir the clause respecting the payment & the estate itself extends to all the heirs of A (whether lineal or collateral) in succession. In construction the general intent manifest upon the whole face of the instrument is to govern. tho opposed by the meaning of particular words & phrases. Dy. 240. Cro Ch 43. 615. 1 Bow 403. If the thing is not done or delivered as agreed the value thereof at the time of performance is the rule of damages, but if the thing has risen in value subsequent to that time then the value at the time of trial or rather the highest price in the intervening time is the rule. 1 Ber 217. 1 Cy. Co 221. H. 606. 2 Bur 1011. 2 Bos 394. 1 Est. 211. 1 Bow 409. If there be several instruments executed between the same parties on the same subject matter they are consid as one instrument. as in the Com exam of an absolute deed & defeasance the former being given by the grantee & the latter by the grantee which have already been consid one instrument) viz a "Mortgage" 2 Ber 518. 5 Bac 410.

The manner in which Contr may be annulled, discharged or waived. is the next subject of consideration. When the terms of the agreement are not accepted on both sides it is not consummate and both parties have the

privilige of retracting 5 D.R. 653. An offer on one side & acceptance on the other constitutes a cont & either party by performance or by tenan thereof may bind the other party. 2 Blk 444. Hob 41. 2 Bos 63-4. 2 Bac. 241. If an offer is made on one side and accepted on the other & if earnest be paid or a future time fixed for the performance the property is changed from the date of the agreet. Reg 42 Blk 447. 1 H.B 363. 7 T.R 64. When the minds of the parties meet each of them acquires a present right the one to the property the other to the price altho the agreet is to be executed in future. But if no offer & acceptance nothing is done there is no consummated cont. If there is no payment, no delivery, no time specified there is a virtual waiver of the agreet for it is always supposed that it is to be carried into execution "instanter" unless it is expressly stipulated to the contrary. 2 Blk 447. Plow 302-9. 1 H.B. 363. 2 B 316. 1 Bos 231 If a cont to sell B goods if he will give notice of acceptance in 24 hours A is not bound tho B give the notice required for there is no reciprocity in the agreet since B had an election either to accept or not & therefore A has a locus penitentiæ & may retract if he please. (3 D.R. 653.) or in other words there can be no such thing in law as a refusal of property. Before a right of action has accrued in a simple cont the parties may rescind it by mutual assent tho by parol. Com. Dig. pleas. 2. G. 13. Cro E 583. 2 Lev 144. 4 Bac 265. But when a right of action has accrued it cannot be released by parol but must be done by deed unless it is to operate by way of accord & satisfaction. as in the case of the sale of a horse which has been tendered in pursuance of the agreet here a right of action has accrued to the vendor which can only be discharged by deed. Cro E. 384. 1 Mod 259. 2 S. 44. 12 S. 538. 1 Bos 412. 13-16. It is however a rule of the Law mer. that the acceptor of a bill of ex. may be discharged by parol tho subsequent to the time it has become due which does not in this respect coincide with the com law. Doug 235-47. Chit. bill 483-4 In Eq an agreet may be waived merely by a long omission to claim under it. It is considered dormant and rescinded by mutual assent. 3 Mod 2-3. 2 E.C. 207. 2 B.C. Ca 116. 1 Bos 413. A cont. consummated & executed may be annulled & that too by one of the parties when it is in pursuance of a provision to that effect. Bull Nisi. Eq. A contracts with B for a carriage & horses with liberty to return them in a given time, here if the vendor refuses to receive them & return the money Indeb. assumpt. may be maintained against him. 1 T.R. 135. 7 T.R. 201. Comp 818. Doug 23 2 East 145. 1 B.C. 351. 3 E. Ca. 82. A cont. may be released as well after as before it has been broken & a right of action accrued

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This clean may be either express or tacit the first of which is by deed & the last by obliteration or cancellation. If he who is to be benefitted by the performance of a cont. prevents it the other party will be discharged. 8. Co 91-2a. 1 Inst 206a. Cro. E. 394a. 1 Pow 265-416. The party who is prevented is in the same case as tho he had performed & may maintain his action for the price stipulated. 1 Inst 206b. 1 Pow 419-21

A cont. may be cancelled by entering into a new one of a higher nature with respect to the same subject matter. In the language of the law the new cont. merges the old one as if a simple cont is subsisting between two parties and they afterwards enter into a bond & this is afterwards turned into a judgt. Here the simple cont is first merged in the bond & this in its turn in the judgt. It is not the intention of the parties to create a new debt nor to furnish a twofold remedy but to substitute a higher for a lower one. 6 Co 45 3 Bac 134. 5. N. P. 155. 3 Est. 251. But such is not the effect when the higher cont is entered into by a stranger. thus if indebted to B on simple cont. & a stranger gives to B a bond by way of security. Here is no merger & B may sue either party A on the simple cont or B on his bond. Dy 231-6a. 1 Rolls 423a. And a cont of a given degree cannot be extinguished by one of the same degree but this merely gives an additional remedy. 1 Bur 9a. Cro. J. 379a. Cro E. 517a. Whitt bill. 62a. When the record cont is intended to be a substitute for the former it may in that way be an effectual defence to an action on the first. 5 Co 117a. Stat. 426a. 2 T R. 26a 3 East. 257a. 5 T. 232a. When a cont of a lower nature is inserted in one of a higher merely by way of recital or for the purpose of corroborating or to enlarge the remedy it is not merged. Thus one sells goods & takes a deed which recites the simple cont. the intention of the parties is not to turn this simple cont into a specialty but only to give additional security 1 Bac 19. 1 Bid 118. 2 Bulst 256a. Cro C 644a. 1 Bac 218-23-5a. A cont by deed cannot be annulled unless it is by deed for it is a maxim of the law that in dissolving conts it must be done "eo ligamine quo ligatur" 6 Co 44a. 2 Wils 86. 376. 1 Saun 291a. Cro. J. 254. In pleading it is not correct to aver a record satisfaction of the bond itself but only of the money due on the bond. Yel 19a Cro. J. 254a. 4 Mod 144a. When the right & duty created by a cont. meet in one it is at law discharged, as where the debtor becomes the Exr of his Creditor. 8 Co 136a. Stat 300. 2 Pow 254-5. 9 Mod 62a. Mo. 315a. 3 Bac 699a. The rule is the same where a marriage ensues between debtor & creditor 1 Pow 438-9-44a. But in these cases relief is to be had in Eq. so as to do justice to the rights of all third persons. As where the pay of money due from an Exr is requisite to make a sufficiency of assets.

A Cont may also be discharged by an act of the Legislature. Thus a particular thing is stipulated to be done but Stat. intervenes & makes it illegal, the party is not bound to the performance 2 Mod 198. 3 Mod 51. 2 Mod 248. So the agreement may be discharged by an act of God or inevitable accident - 10 Mod. 268. 1 Co 98. Hog 35 1 Rol 447. Dav 348. 10 C. 1b. The act of a third person cannot vary the terms of a cont. tho' it may contain provisions which relate to that third person 1 Rol 145 But if the act is by the terms of it to take effect, to be varied or annulled at his pleasure his act will control it as provided - 1 Rol 445-6.

The following was omitted by mistake on page 39

In the above cases there was not even a colourable liability, as when an infant purchases silks & velvets & dies. his Exr promised to pay in consideration of forbearance & was held liable Lut. 819. Sy 171. 1 Ves 336.

Contracts considered with respect to the terms of their consideration are of three kinds 1st Those which are called mutual & dependent. Where that which is stipulated on one side is in consequence of that which is stipulated on the other. A engages to pay B a sum of money in consideration that the latter will erect him a house B cannot institute a suit against A without averring performance or that which is equivalent thereto. 1 Bent 177-214. 3 Salk 95. Hob 166. 7 Co 10. 1 Ld R. 274 5. 1 Wils 240. With respect to what is equivalent to performance it has been decided that a tender, or prevention by the opposite party, or absence when his presence was necessary to carry it into effect the agreement are equally efficacious as performance itself. 7 T. R 130. 1 B & 38-45 Ld R 1230. 1 Doug 239 Ld R. 186. 1 Chit 203 & 619

2nd The second class are those in which performance on both sides is concurrent and in which neither can recover without the proper averment or it equivalent as above mentioned. A promises to deliver a load of wheat to B at a given time & place & for a given price in this their acts are concurrent & neither obliged to treat the This. 1 Dan 320. 1 East 203. 619 2 Y. R. 240 - 7 T. R. 115 1 D. 761 8 J 366. 1 Wils. 363. If the agreement is that one party shall do an act for which the other shall pay the performance of the act is a condition precedent to the payment. But if the day limited for payment is to arrive or may arrive before the performance this last is not a condition precedent. As if in consideration of your building me a house I promise to pay you $1000 at the end of your work. You may sue me for non payment at the expiration of the time limited whether the house is built or not. 1 Dan 320. 2 Ld R 240 1 Dan 328. 6 T. R. 572 7 J 130. 2 H. B. 359. 7 Co 10.

The rule is the same when any time is limited for the payment of money whether any time is fixed for the performance of the act or not. 2 N. R 233. 1 Saun 320. But if the day of payment is to happen after the time fixed for doing the act performance is a condition precedent & must be averred. In the above cases the supposed intention of the parties is the rule of construction. 2 Salk 171. 3 Salk 95 Saun 320-6. 2 N R 240-6. 12 Mod 462. 2d Ray 665. Contra Dy 776 1 Roll 114-5. — — — — — —

Covenant Broken.

In common language the words covenant, contract & agreement are synonymous but the technical meaning of the word Covenant, is a Contract written & sealed & may be either by indenture or by a deed poll Finch. 340. Co. Dig. 266. The action founded on a covenant is termed Covenant Broken. The a cov. is in form of a deed by indenture as well as well as in that of a deed poll yet it is sufficient to sustain an action if the covenantor execute it. And indeed it is in general true that an instrument executed by the party whom it imports to bind is good against him. Co. Lit. 212. Co. Dig. 266. The usual remedy to enforce a Cov. is an action at Law for damages, that action of which are now trespass. Debt will in some cases lie upon a ~~sum certain~~ Cov. to pay a sum certain, or a sum which by a reference to a known standard or process can be reduced to a certainty; for id certum est quod certum reddi potest. Thus if I cov. to pay £100, Cov. book, & debt are concurrent remedies. Also if me cov. to pay the market price for any article debt will lie no doubt as it can be reduced to a certainty by averment. But it appears that Cov. Broken will always lie but debt only in some particular cases 2 Lit 10 Esp. Dal N. C. 16. 3 Law Lib 29. The usual remedy is an action at Law but when one cov. to do something in specie i.e. some specific act, as a cov. to execute a Deed &c the common remedy is by bill in Chan. 1 Fonb 27-139-156. 1 Bac 92. But it is a general rule, when a compensation for cov. broke lies in damages only a bill in Chan cannot be maintained. In cases of a contrary an adequate remedy can be given in a court of Law it is not the business of a Ct of Eq to ascertain damages 3 P. W. 370. 2 Browns Chan 340. 1 Fonb 27-139.

But this rule is not universal to be merely collateral to a ground of relief cognizable in Eq. the cov. may be enforced. Thus where a matter of fraud is mixed with damages or a question of fraud is connected with the question of Damages the party may go into Chancery. A sues B. at Law on a cov. B files a bill praying an injunction and alledging a fraud in the execution of the deed. A may bring a cross-bill denying the fraud & praying damages. Now if B does not prove his allegation the Court will award damages in favor of A. or they will direct an issue quantum damnificatus upon the return of which they will give judgment. 1 Eq. Ca. 17. 1 Bac. Ab-526. 2 Fon Cont 216

With respect to the kinds of Covts known in the Com Law there are several coordinate divisions & first all are divided into two kinds. Covts in Deed and Covts in Law. The first kind is expressly made in the Covt is expressly recited in the deed itself. 4 Co 80. Co. L. 266. The second are such as are raised or implyed by the law. The first are sometimes called express Covts the latter implied. Thus if A makes a lease to B for a certain number of years & nothing more is stated the law implies or raises a Covt on the part of A that B shall quietly enjoy 1 Inst 384 Co. L. 266. The specified difference between a Covt in deed & a Covt in Law, is that a Covt in deed is founded on the specific words used tho not the most apt for making a contract, on the other hand Covts in Law are implied not from the words but from the nature of the Covt which is expressed. Thus the words I give grant demise &c imply an undertaking that the grantor has a good title. There is however no necessary connexion between the meaning of the words & the agreement which the law implies but it depends wholly on the nature of the contract 4 Co 80-b 5 mm 17. Lutth 98 1 Roll 519. 2 Mod 92. Fam. 888.

Covts are susceptable of another division as being either real or personal. The first of which is a Covt to pass or assure things real as lands tenements &c. Co. L. a common Covt of warranty is a Covt real. A personal Covt is one which is annexed to the person or respects personalty only, as a Covt to labor or, to pay money which affects the personal estate so an indebtation is a personal Covt 1 Dust. 96 Co. L. 266-94 & Co 16-17. Fitz 145-343 This division is derived from the subject of the Covt but the former division of Deed & Law is derived from the nature of it. To constitute a Covt no set form of words or technical language is necessary, any words showing the concurrence of the parties is sufficient 1 Dur 290. 1 Roll 518 1 Lev 47. 1 Lut 16 1 Bac 527. Thus in the case of a lease where the words "receiving so much rent" are used the lessee in accepting the L. are adopts the language as his & Covts to pay the rent. Bro C 202. 1 Sa. Cont. 241-2. 1 Dent 375. 1 Saun 241. note The subject of a Covt may be something past present or future as when a Lessor covts & warrant & repine in favor of his lessee Plow 310. Covts in law may by express agreement be restricted or excluded & it is a general rule that the L will not imply

when there is an express agreat Yelv. 175. 6 Mod. 2 Ld. 278. 4 Co. 80. 3 Co. C. 675. If I Covt against eviction by myself and my representatives I should not be liable for eviction by a due Course of Law by a stranger. — For this confining the eviction to myself & representatives excludes the other which the Law would otherwise imply. Co. C. 214. C. P. Ld. 268. 4 Co. 76. A Lease in form of a mere recital of agreat will create a Covt on which an action will lie. Thus the words whereas it has been agreed that A on the one part shall pay to B £300. & B do Covt to serve him one year is import an express agreat or rather Covt to pay £300 Rabbl. 465. 1 Leonard 122. C. P. Ld. 268. but as to Covts in deed if the term Covts is not used there must be some other word or words used so as to import an agreat and which may be construed into terms of compact & be upon the words said not be the most apt. Thus if one Covenants to build a house provided the Covee furnish timber. This does not bind the Covee it is only a Condition or qualification annexed to the Covt. But if it is provided & agreed that Covr shall furnish timber this a Covt 1 Roll 317. 1 Sharpe 48. And when the clause in a deed is a mere defeasance it can never amt to a Covt. Thus C. P. If a Lessor execute a collateral bond conditioned for the performance of Covts it extends as well to Covts implied as well as express. Thus the bond would be forfeited on a breach of the implied Covt which arises from the words, give, grant &c. — 4 Co. 80 b. The rule is that Covts are to be expounded liberally i.e. the intention of the parties is to govern without that strict attent to artificial rules as in Law executed. 1 Inst. 45-6. Plow 160. 1 Roll 419. Hence a literal performance will not avail the Covee in some instances but it must be substantial in pursuance of the spirit of the instrument. — Thus when A Covts to deliver to B his bond on such a day, but in the mean time sues B & recovers on the bond & then delivers it up by the time. this was held a breach Co. C. 7 1 Sid. 48. C. P. Ld. 276. 1 Dall 539. So also when Lessor agreed to leave all the timber on the farm. He cut it down & left it indeed this too was consid a breach because not according to the spirit of the Covt. 2 Ray 464. 1 W. B. 276 C. P. Ld. 271. So if one Covee to deliver a piece of cloth & then cut holes in it & when one Covt to deliver all the grains from his brewery & mixed ashes with them, the delivered there

Covenant Broken (Construction of Covenants)

is notwithstanding a breach of cov^t in either case.— James Root 2 Spen 39-40. 1 Bac. Ab. 242. But on the other hand a substantial performance is sufficient tho not literal. Thus when A covenants with B that his son shall marry the daughter of B. under the age of consent if the marriage should take place it would be a performance tho the son should afterwards dissent. for that was all the parties contemplated altho not a literal performance became void. 1 Lem. 52, Cro Eliz. 270. In the construction of cov^ts it is further to be observed that when words are used which are doubtful or uncertain they are to be taken most strongly against the cov^r and favorably for the cov^ee. Thus if A grants an annuity of £20 per annum to B. it is taken to be a grant for the life of B tho no time was limited or expressed.— for that would be most beneficial to the grantee and the greatest estate he can have of it. 1 Lev 102. 1 Sid 151. Cro Eliz 271. 1 Bac 339. If one covts to convey land to another by a particular day & before it arrives grants it to a third person. this grant or conveyance is ipso facto a breach of cov^t for if a party voluntarily disables himself to fulfil he disables himself immediately even before the time of performance has arrived. 8 Co 21 a. 7 Co 10. Moor 318-323. 1 Sons. 322. 6 E.6. 111. So if A cov^t to convey his house to B three years hence & voluntarily destroys it to day he is liable immediately. There are some cases where a clause of exception in a Lease amounts to a cov^t on the part of the Lessee & others not. The distinc^n is this when the Lease is of a given subject excepting a particular part then is no cov^t that the Lessee shall not enjoy that part or disturb the Lessor in the enjoy^t for as to that he is a mere stranger & would indeed be liable in trespass but not in cov^t brok. This is a cov^t that the part shall not pass & he may be restrained by it should he attempt to recover the part excepted. But where the except^n is something to come out of & is not a part of it, it is a cov^t on the part of the Lessee that the lessor may occupy & enjoy as in the common case of easements. also where one leases a farm with a right of way reserved there he is not a stranger to the exception. Cro E. 654-90. 6 mo Dl it was 62 1 Roll 431. Cro Eliz 232. Salk 196. 1 Saund. 235. — There is said to be a difference between express & implied cov^ts in this particular, that the former are construed

Covenant Broken Construction of

more strictly than the latter. As if one conts to perform a certain voyage by such a time, he must do it else it will be a breach, An act of God or inevitable accident will be no excuse for he is considered in the light of an insurer. 3 Bur 1637. 8 T.R. 259. 3 East 233. 2 H.B. 258.

So also when there is an absolute covt to pay rent for a house for 20 years the Lessee is bound tho the house is destroyed by tempest or burnt by lightning even the next day for he should have qualified his covenant 1 T.R. 310-706. La Ray 1077. 1 Fonb. 366. 6 D. & E. 270. Whether a court of Eq. would give relief in such a case has been a question considerably agitated. 1 Cases in Chan 83. Ambler 619. An opinion has been expressed in favor of the relief in one of the cases and decided in another. 1 Fonb. 371 note But I am clearly of opinion that Lessee is remediless in Eq. in such a case for that Court cannot controul the Law it can only restrain its generality & prevent its application to cases which were not contemplated when forming it. And besides what was the intention of the Parties? Plainly to transfer an interest in the House leased for a certain number of years. Suppose the conveyance had been in fee would not the loss have fallen on the Grantee & if so whom is the difference because it is a less estate. In the case of implied covts such accidents will excuse the covtor thus in the covt for quiet enjoyt in case of loss by lightning them would be no pretence that the covtor was liable. 3 Bur 1639. 1 Fonb 366. Doug 239.

Many instances have occurred in bailments where the express have been construed more strictly than the implied covts It is a gen rule that the performance of any express covt is not discharged by any collateral matter. But to this there are some exceptions. II If one covts to do some act which is lawful at the time but before the time of performance by a subsequent Statute it is made unlawful. It is held tho the interposition of Statute is collateral matter as it is called for the Law will not subject a man in damages for not doing some act which the same Law would punish him for doing. Cro Jac 198 Cro Eliz 171. If one covts not to do a thing & a subsequent Stat makes it his duty to do it, the covt is void. Thus if A covs not to grant a grant not depart from him in any wise & on account of insurrection or by

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strength he is obliged by the laws of the land to leave him he is released from his cov[t]. But where the cov[ts] not to do an unlawful act which is by subsequent statute made lawful he is bounde 1 Salk 198 It is a gen[l] rule that all cov[ts] relating to any subject matter are confined to that which was in being at the time of the execution. Thus if a Lessor cov[ts] to pay all taxes on the Land leased it extends only to those taxes that were in being at the time of the execution of the cov[t] and not to any new kind of tax. which may have been laid subsequently. As if I hire a house & cov[t] to pay all taxes & the only one then in being is one upon hearths. & a subsequent tax is laid on lights I am not bound for it. 1 Co. 65. 1 Bos. & P. 273 3 T. R. 277. Strangh 1191. If a person to whom an obligation is given assign it & another such ass[t] and [d] & a cov[t] that the ass[ee] shall have all the benefit of it. or that he may sue & collect in the name of the ass[or] but not in his own name for the instrument is supposed not assignable. but between ass[or] & ass[ee] it is good in cov[t] brok. 1 Pow. Cont 317. Salk 125. Chitt. bills. 109. 2 Ld. R. 683. 2 Ld. 842. 3 Keble 304. 2 Bos. 560. In connec[n] with usual practice has been for ass[ee] to ass[or] on the case for fraud. And it is now well settled that if the obligor take a release or pay the money to person of the ass[or] he is liable in the same form of action. But this is not the mode of proceeding in Eng. the relief there is in Eq[y] as also in the neighboring States where there is a court of Chancery. A cov[t] in one deed cannot be pleaded in bar of an action upon a cov[t] in another unless the former is in the nature of a defeasance or release. 2 Bos & P. 214. C. Ld. R. 305. As thus if A. cov[ts] with B. that he will not sue him in one month, in another cov[t]. There the former cannot be pleaded in bar to an ass[t] on the latter. But a defeasance or a special deed may be pleaded in bar. As if A on the ex[n] of an obligation by B enters into a counter cov[t] that the former shall be void in a certain event, should he sue the event having occurred the defeasance may be pleaded in bar. 2 Lk 573. 3 Mod. Cro. C. 526. Cro. J. 306. 623. 3 Salk 290 A cov[t] by a creditor not to sue his debtor within a limited time cannot be pleaded in bar of the action for the debt but the creditor if he does sue is liable in cov[t] brok. for if it could be pleaded in bar would be a release for the time and if a release for the time, then forever for a right to

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(Continued from p. 12)

a pers. nal action when once suspended is wholly extinguished
Hob 10. 2 Hen Blk 11 notes Carthew 63. Salk 573. Lev Ray
187-393-413. 1 Sow Cont 235. But if such a cov. makes a
part of the deed as a note underwritten or a memorandum
endorsed it precludes an action until the time limited has
expired. The reason is the whole is to be construed together —
As if A should give a note to B for £100 & B should cov.
by endorsement not to sue it within one year it is the
same as a note due in one year hence 3 T.R. 453. 6 Co. Rep. 36.
6 T.R. 737. Salk Reports. 1 Lev 152. Even more than a gen.
rule that on cov. may be plead in bar to an action on another
in the same deed (that) without words of defeasance.
Thus if the Lessee cov. to pay 10£ rent per ann. & the Lessor
cov. for the Lessee to retain 5£ for repairs. If the Lessor sue
for that sum no cov. may be pleaded in bar of the action
The rule that a cov. not to sue within a limited time
is no bar seems to apply to personal actions or rights as the
reason of it does not extend to those which are real as a suspension
of these is not an extinction. 2 H. Blk 4. But a cov.
not to sue at all is a release & is pleaded as such whether the
action is real or personal Cro E 332. 1 T.R. 466 & same 170
486. 1 Roll 939. This rule is designed to prevent a multiplicity
of suits & to prohibit one & the same object for if it were so
considered a release the Creditor might sue & recover & the debtor bring
a counter act. & recover back what had been obtained from him in
the former act. So that to prevent these vexatious circuitousness of
suits & with no other advantage than bills of cost & after all
remains in State quo the Law makes it a release 1 T.R. 466
But a cov. not to sue at all one of two joint & several debtors
is no bar to an act against the other debtor nor to the cov. himself
but a release to one is a release to both Lev Ray 682. Holt 178
8 Co. 168. 171. 9 Mod 254. 12 Mod 334. Now in the latter case the
reason why it is not considered a release is plainly because it was
not the intention of the party to discharge the claim if he could
sue the joint & several debtors, he could have released both.
But if the obligation was joint & not several a cov. not to sue
would release both for he could not sue one without suing
both. This is not settled in the books. If a creditor cov. with
his debtor not to sue him within a limited time, and the cov. is that

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that if he does sue the obligation shall be void. This is not an absolute release but a conditional one but if the suit is brot within the time it is absolute. Carth 64-210. Cumberl. 126 1 Shower 46.-320-50. Holt 69. A cov not to sue in a foreign country is a good bar to a suit in that foreign country. A is not an absolute but a local release 2 H. Blk 163 171 La. C. 69. Comyns Rep. 139. 3 Salk 295.

And such a suit as this is allowed for it is a reasonable one not opposed to the policy of the Law but a cov by which one stipulates to preclude himself from resorting to the proper remedies of Law is void. H Blk 606. And it is in pursuance of this rule that a mutual amicable submission to arbitrament is revocable it is not void but only voidable, tho the award after it is made is binding on the parties.-

Cov^ts in Deeds. Cov^ts of seisin & warranty distinct

The next subject of consideration is the covts used in conveyances. In all deeds of conveyance except quit claim or release there are two covts either express or implied II. A covt of seisin or good title II II A covenant of warranty or quiet enjoyment The first is only a covt of seisin with the second a covt to protect it. 4 Co 86 b. You when there are no covts express the Law will imply both from the words dedi &c unless there be something in the deed to expound this presumption or rebut the implication. 1 Roll 519-20. Lyn 25 2 Mod 92 Cro Li 266-7-8. A covt of seisin or good title is a covt de presenti that the covtor hath not a sufficient title it is a breach "so instanti" on the execution & he is liable immediately & the covt may be sued upon before ejectment or disturbance & it is sufficient to sustain the act that the grantor was not well seized, actual damage is not considered. Cro J 176-369. 4 Co 66. C. Li 2 99. In an act of deseisen it is enough to aver that the deft was not well seised without showing how & the onus probandi lies on the grantor for in pleading the covt I am well seized it is enough to show that I am not well seized. A covt of seisin is broken not only by a total defect of title but by an incumbrance on the land unless it were specially excepted in the deed 3 Cart 491. 4 Johnson 1st In this case i.e. when the breach consists in some incumbrance it must appear in the declaration of what that breach specially consists. It is not sufficient in the other case to show that it is merely worth

Covenant for Quiet Enjoyment — Deed

the covt must take the burden of proof & support the affirmative 2 Mfs Rep 433-7. A covt of warranty or quiet possession on the other hand is a covt de futuro in its nature & the covtee cant sue upon it until he has been evicted — it must be an entire one, not the eviction was under colour of title but that it was under elder & good title 4 Co. 81 b. 1 Mod Rep 242. 4 Taunt 61 Mo Rep 315 — 1 H Blk 3-6-277. Cro Ja. 207. Alledging them in the declaration that the covtee was evicted by such a one having good title is not suff. for it may have been made by the covtee himself. 1 Sid 466 1 Saund 177. It must appear then in the declaration that the evictor had elder & higher title than the covtor conveyed & alledging in the declaration that the eviction was by suit is nothing for it may have been by mistake default &c. 1 Lev 37. 4 T.R. 614-7 2 Saund 177. 1 Sid 466. 2 T.R. 278. Cro Ja. 302. Nor is it necessary to state in what the eviction was i.e. the Court is not bound to show from whom it is enough to show that was better & elder title. Saund 177. Sid 466. The reason why the eviction must be alleged to be under title at all is because covt must not be subjected for tortious entries or eviction for to extend it thus far would be to go beyond the intention of the parties Strange 410. 3 Br. P.C. 586 4 Taunt 65. Hobart 34. Cro Ja. 273-301. A grantee may indeed expressly covt against tortious entries for any man may bring incantations enjoin any thing he pleases & the grantee & the delegation of clear title in the case is not necessary. Cro Ja. 273-4.

But a covt against a particular person has been decided to extend to tortious evictions. and this rule is founded on the supposed intention of the parties. Hob 95. Cro C 212. 1 Roll 413. H 460 but this seems to be an unreasonable construction, but if the covtor himself disturbs the covtee by a tortious act under claim of title he is liable. by a tortious act under claim of title in this case is meant such an act as amounts to an assertion of right. for he cannot take advantage of his own wrong. 1 T.R. 671. 1 Roll. Rep. 91 2 Shower 425. Cro Ja. 273-302. And the rule is the same as to all persons included in the covt ex. representatives of the Grantor or their covtee &c. The cases of Leases on eviction by Lessor himself suspends the rent. But an act of trespass or mere entry upon the land does not. The former is a breach of covt or part of the Lessor & the cannot claim performance on the part of the Lessee, but the latter is not. See Cowp 242. And it is not the same the

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Covenants in Deeds

such heir or Ex. is not named in the Covt. Dyer 257 B. Coll. Rep. 21. Co. L. 302. A Covt by Ex. as such is restrained to Ex. themselves & those holding under them since to subject them in a Covt the breach must happen directly or indirectly by their own act. Shepard 2 Com 163. 1 Atk 34 It is a little difficult to be satisfied that this is the intention of the parties but the reason is probably that an Ex. when Covts as such does it only in his representative capacity. This is a technical reason but must answer. — I have already stated the difference between Covt of seisin & Covt of warranty. The rule of Damages in act. on the two Covts is also different & one rule as to the latter is also different from the Eng. In seisin the Pff recovers the consideration money & interest 4 Mfs Rep 198. 1 Selw. N.P. 131 note 2 Mfs Rep 435-45. 4 Dow. 1. 5 same 49. 6 Dallas 115 1 Root 100 The interest in this case is calculated from the time the money was paid & said Brown, if not from the time the cove was broken to pay interest. Here the Pff recovers the sum from the time the Covt was broken — This is the same as in Eng. but in the Covt of warranty there is an additional item, the Pff recovers not only the consideration money paid & interest, but also the costs of the suit by which he was evicted. That is the damages he has sustained by eviction 3 Caines 111. 2 Dow 193 In Conn. & Mass. the Pff. recovers the value of the Land at the time of eviction i.e. the loss of the bargain the damages of eviction. Kirby 3. 1 Mfs Rep 440. Dic. 343-6 On principle I think our rule is the correct one. It is analogous to the rule in case of seisin, it is the value of the Land at the time of breach in that case — why not in the other. As any rule it is my own Country, the only rule which can in justice be adopted for the price of Land is constantly rising & may as be altered in value very much by labour. But in Eng. rents of lands are the same they were centuries ago. The Pff then ought to recover the value of the Land at the time of eviction. On a Covt of seisin the assee of a grantee Covt. maintain act. against the grantor because the right on which he relies accrues before the assignment it is a chose in act & cannot be transferred 1 Mfs Rep 439. Pick. N.H. 158-9 Co. Li. 295. 1 Dow 14. But on a Covt of warranty the assee may may maintain act against the grantor for a breach of Covt during the time of such assignee. 5 Co 15-b-17 a. Chit Plead 3-11- 1 Inst 384 a. Shep 198. Pick N.H. 158-9. 3 Dow 471 5 Same 126 —

Covenants Broken (Cont'd)

That an intermediate assignee who has not been damnified by eviction or subsequent assignment by suit cannot maintain an action against the original grantor for in that case he might be subjected to an indefinite number of suits. In the case of the covt of seisen the grantee may recover at least nominal damages against the grantor altho he may have been subjected to an assignment on account of eviction. 1 Con. Rep 244.

In an action on covts of seizin the defendant cannot demand a title subsequent to the act complained of. 5 Johnby 1 East 507. 3 T.R. 186. 2 Hawk 171. But a subsequent acquisition of title will go to mitigate damages. If an ejectment is brought against a grantee it is a claim of title with the right right for his own security to notify the grantor that he may appear & defend he is not indeed obliged to do it for he may be himself capable of defending. This notification when the subject is a freehold is called vouching in the nature or case 5. Bl. 301. 2 Bull 396. Gilb Law of Evid 98 This practice of vouching is used in this State in ejectment as well as assizen when a term of years as well as a freehold is in the Question. But in Eng. it is confined to real actions. 1 Inst 101 303 a. Our mode of giving notice is by a summons of voucher as it is called. — will for his own security. The covtee if he is not vouched in is not concluded by the judgment might be obtained against the covtor but if he is he then becomes a party on record & cannot defend by plea of good title in a subsequent act between himself & the grantor. He is estopped whether he appears or not. Gilb Ev 28. Gilb 22. 1 Roll 39. Bunk 60. 39.

But when deeds or releases contain neither of these covts of seizin or warranty for if they do they seem to be quit claims. It was formerly holden in this State that the Quit claimant was liable in act on the case for misrepresentation. but has been recently determined otherwise in the case of Salmon & Sherwood. 11 Day 128. Also in Eng.

Covenant Broken. &c. Bonds &c.

If one wishes for security he should require all necessary covts both as to the title of the Land as well as to the quality of soil, & generally Dalk 211. 2 Ld Ray 1185. Cro J 196-318. 3 Dc 281 It seems however that this is not very well settled in Eng. 1 Inst 384 a. note. Cruise Dig. tit 38. Chap 5th sec 87. 1 Wms 366. 2 Vernes 143. It appears to me that in this country the rule ought to be sustained to prevent the fraud so common in the sale of Lands to our wild & remote Lands are continually in market. There is another species of covt which requires distinct consideration. These are bonds. or covts to pay money by instalments. - On a bond with a penalty condn for payt of an aggregate sum by instalts Debt lies for the aggregate sum on the first breach & by com law the whole is recoverable 1 Ath L 118. 1 Wms 30. 2 St 515-814. Cro J 598. Cro C 205. And see Ld Ray 1185. - A rule directly contrary is laid down in the following 1 Inst 47 b. 2 Jo. b. 10 Co 128-128. 1 H Blk 348. Cro C 205. Bull N.P. 168. These last apply to single bills which differ from others as they have no penalty annexed. - The reason of the rule is obvious from the nature of the instruments to which the distinction between bonds & single bills must be referred 1 Roll 601. 1 Inst 47. 292. b. 10 Co 28. Lit 205. By one that a court of Law has a right to chancer the damages in any penal bond & the party is to recover no more than the actual damages. On failure of payment of the first instalment an action lies on the bond & the amt of the instalt is the rule of damages & by fiere facias on that judgt Execution may be had for any subsequent failure, Coles qualies Stat Cov 356. But on the other hand debt will lie for each failure to pay rent by instalments for it is a mere reservation of the profits or issues of the Land. 3 Co 22. 10 i. b. 126. In a Cov. or note for payment of money by installments an gen. of assumpt or Cov. may be sustained as often as the instalts become due Cro C. 175. 3 Co 82. 4 Comyns 193. Cro J 165. Salk 165. Bull N.P. 166. 1 H Blk 647. Cro C. 776. 867. Contra. see Cro C. 118. If there is no aggregate in the bond debt will lie for each successive payment. Bull N.P. 163. Cro C 776-867. 1 Salk 538. Cro C 118. 1 Inst 292. b.

A Clause in a ~~bond~~ covenant that on the non payt of the installment the whole shall become payable immediately is good Chitty on Bills 212-13. Contra see Cro James 505.

Covenant Broken. Covenn. Rights of representatives &c

The next subject of consideration is the rights & liabilities of the ~~personal~~ representatives of the Covenantor. In the language of the Com. Law the personal representatives, as Exrs & Admrs are implied in himself. That is they are bound in all cases when he is the not named. 1 Roll 519. Yelv 114 as 2 PWms 199 & 1 Pow Cont 128. This rule however is not universal. There is an exn when the cont is collateral, that is when it is founded on personal confidence — as in the case of an indenture of apprenticeship. 6 C. 33. 1 Sid 216 Com. Dig 11th Cov. C 1. 2 Mod 269. But the personal representative is bound in the last case if the Cov was broken during the life time of the Covr for a right of action had already accrued for damages which are personal & must have been recovered out of personal assets consequently his personable representative is liable. An ancestor seized in fee may bind his heir by Covt. As if A covenants to convey land a certain day & dies his heir may be compelled in Chan. to convey tho not named in the covenant. Dyer 338. 2 Ves 213. And indeed it is a general rule that Covts real bind the heirs of the ~~Heirs of the~~ Covenantor & descend to the heirs of the Covenantee & the same rule whether named or not. Ball & P 158. 1 Roll 520. Fitzherb 343. Esp Dig 294. And the heirs of the Covee may sue on the Cov tho not named, if the Cov runs with the land and appears to be designed to continue after & is broken after the Covees death. Thus if A leases land to B & he Covts to keep ~~keep~~ leave it in repair. A dies & the land is not in repair. The heir may maintain action against the lessee. 2 Sa 92. Skin 305. Esp Dig 343. If A covenants with B his heirs & assigns for quiet enjoyment & the Cov. is broken in the life time of B. his exr is entitled to the action & not his heir at law. tho the Ct is not named in the Covt. & the reason is because the Cov was broken in the lifetime of the Covenantee. If in Covts real the Cov is not broken till after the death of the Covee the right of action accrues to the heir at Law. 2 Sa 26. 1 Brownl 176. 347 Ball & B 158. Esp Dig 293. Salk 141. 2 Sa. 92. Again if on grant with Cov of quiet enjoy the Cov is broken after the death of Covee & his heir is evicted the right of action accrues to him. Auth supra. But the Covor Exr is liable for a breach which happened during the life time of the Covor tho the Cov is real. As if A convey to B with Cov. of seizin if it is broken it is broken eo instanti in which it is made. Consequently damages accrued against

Covenant Broken Right of representative &c

the Cov^r in his life time, this being out of his personal power his Ex^r is bound. And the action will also lie against the Ex^r tho the Cov. be real, when he is named expressly & the not broken till after the Cov^rs death. 1 Roll 919. Com Di Pl Cov C.1 Bro C 553. 1 Bac Cont 128. 1 P.W. 197. But when on a Cov not express but implied by Law & not broken till after Cov^rs death his Ex^r is not liable tho in express Cov he would be. The liability descends. Cro C. 157. 1 Bac 533. 2 Lyn 257.

If an Ex^r or Adm^r comes into poss. of an estate for a term of years he is considered in his representative capacity as an assignee of the term & may be so described in the declaration for he is such by act of Law — he is liable however only for such breaches as happen during his own poss. 1 Wms 4. 1 Salk 309. Ca Di 296. As to the liability of the heir of the Cov^r the rule is that he is liable for breaches which accrued before or after the death of Cov^r if he is named & has assets. 1 Mon. 357. 1 Coke Litt 365-70-73-84. 2 Blk 378. Ca. Di 294

Note I would observe that in an action against heir at Law on the Cov of his ancestor Infancy is no bar. 1 T.R. 44.

It has been determined in this State that an heir if named in a Cov & having assets by descent is liable at Law in the Cov of seizin of his ancestor. But this cannot be Law for if the Cov is ever broken it is broken eo instanti at which is made the claim to damages rises at this moment & is one outstanding at the time of his death, and the Law makes it the duty of the Ex^r to satisfy all claims & outstanding. With respect to breaches of Cov. on warranty which happen after death of Cov^r the heir is undoubtedly liable as at Com Law but I don't think he is in a Cov^t of seizin. Ex^r is liable only for claims outstanding at the time of Cov^rs decease. Of Cov^ts used in Conveyances some are said to run with the Land & others are denominated collateral. A Cov. is said to run with the land when the obligation which is created by it passes on assignment of interest so as to devolve upon & bind the assignee.

What Cov^ts run with the Land

Those which do not run upon the Land or pass with the interest are called collateral. And out of this distinction arises a diversity of opinion as to the liability of assignees in Covenants used in Conveyances. And on this point the first general rule is that the assignee of a Lease is liable for

1st Gen^l Rule

Covenant Broken Liability of assee on the cov.

1st Rule 2d Rule

breaches during the time he holds prop. tho not named in the Covenant. if the Cov. runs with the Land. On the other hand when collateral if he is not named he is not bound 1 Pont 345 The enquiry then arises in what cases does the Cov run with the Land? — And here it is to be observed that when the thing covenanted to be done or concerning which something was to be done relates to a thing in esse at the time or is part of the thing demised it runs with the Land. Thus if on lease of house & Lessee covenants to make necessary repairs it runs with the Land for if Lessee assigns, assiee is bound. 1 Roll 521. Cro E 407. 3 Co 16 b — 24 a. b. 4 Co 80. — A Cov to pay rent runs with the Land bcaus tho the rent is not in esse yet the Land the thing out of which the rent issues is in esse. Cro C. 383. Hob 334. Bull N. P. 159. On the other hand if the thing covenanted to be done or concerning which something was to be done was not in esse at the time of making the lease, or part of the things demised, the Cov is collateral and the assignee is not bound. Thus suppose that B covenant to build a wall de novo upon Land I assign his interest to C. assignee is not bound, for the wall was not in esse at the time 3 Co 16 — 2 Satk 1271. 3 T R 393. Cro C. 532 1 Bac 534. A Cov which goes to the preservation of the thing demised runs with the Land & binds the assignee tho not named. Thus a covenant to repair runs with the Land but a Cov to build de novo does not. And a Cov to leave such a proportion of the Land untilled runs with the Land bcaus it goes to benefit & support it & the assee is liable for a breach. 3 Lev 233. 3 Co 17-18. 24 B. — Cro J. 125. 1 Ray 303. 2 Vent 330-32.

In regard to the liability of assees there are the general rules —

1st 1st When the Cov. runs with the land they are bound whether named or not. —

2d 2d If the Cov is collateral if the assees are not named they are not bound.

3d 3d If the assees are named in the Lease they are obliged in general to perform the Covs whether they run with the Land or not. 3 Co 16 b. 1 Bac 534. — Thus if A Lease land to B who cov for himself & his assees to build a wall on it within 10 years & before the expiration of that time C is bound. And all those Covs which relate to the thing demised bind the assees when named, But the assees are not bound tho named in the Cov to do an act which does not relate to the thing demised.

Covenant Broken. Liability of ass^ee on cov^t.

The rule is the same if the Lessee covenant to do a collateral act 5 Co. 16 b. Cro. J. 1138. 1 Vent. 352. The reason why the ass^ee is not bound by the cov^t of the Lessee is because he has no privity of contract but only a privity of estate. Consequently he is bound if bound at all only through privity of estate and this privity of estate can only bind him to do an act which relates to the estate demised. But when the ass^ee is bound according to their destination by the cov^t of the Lessee he is liable only for breaches which occur during the time of his poss^n. If a breach occurs before assignment, the ass^ee is in no case liable for them is there no privity of estate. 2 East 575. Hob. Ca. 177. Salk. 199. 3 Bur. 1271 Ld Ray. 388. 1 Term^R 396. Doug. 483. The ass^ee is bound when bound at all only because he takes the interest to which the covenant is attached, his liability therefore cannot extend to any breach which occurs before his interest commenced or after it ceased. Thus if Lessee cov^ts for himself his heirs & assigns to build a house in ten years & after the expiration of that time assigns his interest, his assignee is not liable for a breach in the latter. Hob. Again the assignee is not liable at law after an ass^t over made by himself, and this rule is so strict that if he ass^s the day before the annual rent is due the subsequent ass^ee is liable for the whole rent. Carthw. 177. Doug. 735. 3 Co. 22. 1 Salk. 31 & 31 You Must go to Eq. 159. 4 Mod. 71. The reason why the ass^ee is not liable in this last case is that no part of the rent is due before the last day arrives. This rule does not apply to the Lessee for he is liable on his cov^t for rent for ever. Indeed this rule is so rigid that it will protect the ass^ee tho he should assign on the day before the annual rent became due & thus to a bankrupt or purpose to defraud the prior assignor. Ambler 485. 3 Atk. 221 Sibbert 72-166. 1 B & P. 22. Contra 1 Vent. 329-31.

Reason of his Liability

And if ass^ee should assign to a feme covert the rule is the same. The reason of the rule is the same hereto for given he is liable only on privity of estate & not of contract. It seems however that a Court of Eq^y will compell the ass^ee to account for rent during his possession. 1 Term^R 351-3. 1 Ves. 87 8-165. Wheather a Ct. of Eq^y can in any case restrain by injunction an ass^ee from assigning to a person insolvent seems to be doubtful. It appears to me however that a court cannot restrain a man from assigning that property to which he has an absolute right, merely because it might prove

injurious to a third person 2 At. 219. 1 Fonb^k 331.

Rent may be apportioned

If an ass^ee is evicted of part of the premises he may be compelled at law to pay rent for the residue & the rent may be apportioned. Thus if L. assign to B 100 acres of Land & C & S evicted of 50 he may be subjected at Law for the rent of the 50. Query Why then cannot the rent in the other case be apportioned to the time. The answer is because the time for payment has not expired & not a particle of rent has ever been due. So also if the original Lessee is evicted of part he may be compelled to pay rent for the other part in an action of Debt but not in cov. broken. 3 Co 22 a. b. 2 East 575. The reason of this diversity is that the action Debt for rent is founded on probity of estate but Cov. broken is founded on privity of Contract. and being an entire claim cannot be apportioned. But in Debt he may be subjected pro tanto. —

It was formerly doubted whether a Cov. by Lessee not to assign his estate was binding and this doubt was in consequence of doubt to wit whether it was not inconsistent with the nature of the estate, but it is now settled that such a Cont. by Lessee is binding. and if it is properly framed he will by such ass^t forfeit his estate & it will revert to the Lessor. 2 Ch Ca 100 3 Bls 237. Cowp 133-803. 8 T.R. 870 57— 60—800.

Such a Cov. by lessee is broken only by a voluntary assignment on his part. For if the interest of the Lessee is taken in Ex^n by a Creditor the Cov. is not broken & he is not subjected for the assignment must be a voluntary act. 2 Ch Ca 100 7 Vinn 83. 8 T.R 57. Stra 483. 3 Wils 28 7. Nor is such a Cov broken by an under lease of part of the term for that is not in contemplation of Law an assign^t. Nor is it broken by a devise of the remainder of the term for tho the devise is a voluntary act yet it is in a sense necessary for on the death of Lessee the must pass either to his heir or devisee. 2 Salk Rep. 766. 3 Wils. 234. 8 T.R 59. And it would be safe to lay it down as a general rule that such Cont. is not broken by any assignment effected by operation of Law as C. C. bankruptcy, or treason. But the liability of the original lessee is much more extensive. He is upon his express covenant always liable for the rent, notwithstanding any one or any number of subsequent assignments. 2 Co 29-3. Popham 120. Doug. 443. 4 T.R 98-100. Salk 199. 1 Fonb^k 353-4. 1 Bl Rk 439.

Covenant broken Liability of assp

But where the Lessor has accepted the assignee of Lessee as his tenant as by receiving rent &c. he cannot maintain Debt for rent against the original Lessee for this action is founded on privity of estate which privity of estate the Lessor has determined by accepting the assignee for his tenant Co L 344 3 Co 23 A Bac 1 Salk 439 44. But where there is an express cov. by the Lessee to pay rent he is liable in Cov. brok. for the rent tho. the Lessor has accepted the assignee for his tenant for the privity cont. remains tho. the privity of estate is determined. Co L 309-522. Co C. 188. 1 Sid 402-7. 1 Lutw 257 Bac Ab 159. 1 Lord Ken 354 But where there is no express cont the Lessor can maintain no action against the Lessee for any failure in any forme because the implied cont is founded on the privity of estate which is destroyed by accepting the assignee for tenant Co L 572. 1 Sid 447. 1 Salk 437 439 notes 3 Co 22 a 1 Lord Ken 384 1 Lutw 241 Co. "The Lessor may accept the assignee as tenant by receiving rent of him or in general by any act which causes acceptance. 1 Salk 408 g." When the Cov. for rent is express so that the Lessee's liability continues after assignment the Lessor may sue for rent either the Lessee or assignee or both at the same time in different forms of action but can enforce but one execution except for the costs if suit; for he can never have but one satisfaction. Co L 523. And it is enacted by Stat 32 Henry 8 which being a very ancient Stat is considered as Law in this country that the grantee of the Lessor or the grantee of the reversion as he is commonly called has the same remedy on the covenants running with the Land as the Lessor himself. Thus if A after a Lease to B. for twenty years sells his interest or reversion to D. S.—D. S. has the same remedy against B. on the cov. running with the Land as A himself has. And on the other hand it is provided that the Lessee shall have the same remedy against the Lessors grantee as he has according to the distinctions already taken against the Lessor himself or as he has at the Com Law 1 Inst 215 Co L 522. 5 Co 22. 4 Bac 279. In explaining the law of the assignee of a Lease I observed that the Devisee Lessee was liable in certain cases for rent, without explaining the distinction between a devisee Lessee & an assignee

Covenant Broken — Distinction between an assignee & under lessee.

A derivative Lessee or under tenant is one who takes a conveyance of part of the remainder of an unexpired term. An assignee is one who takes an assignment of the whole of the remainder. A derivative Lessee may however take the whole of the remainder of a term & still retain the character of derivative Lessee if he takes it as tenant to the Lessee & not as tenant to the Lessor, Doug 174 3 Wils 234. 2 Bl. R. 766. Such Derivative Lessee is not bound by the covts of the original Lease as the assee would be, & the reason is that between him & the lessor there is no privity, neither of contract because he was not a party to the Covt. nor yet of estate because he is tenant of the Lessee & not of the Lessor. Auc. Suf & 1 Vent 367-8 Doug 438.

The rule was formerly holden to be the same as to a mortgagee of the whole residue unless he took poss. i.e. he was not liable on the covts of the original lease because between him and the original Lessor there is no privity of contract, see Doug 438. 1 Saun Bl. 114 1 Ld Ray 562 in support of former opinion. Contra see 1 Ves. Jun 215 vol 35 1 Brown Chanc 166 — 1 Ves 12. 3 Atk. 512. 7 T. R. 346.

You from what I have already said you will perceive the difference between an assignment & an under-Lease. An assgt is a sale of the Lessee's interest. An under-Lease is the creation of a new tenancy under the Lessee. An assignee is tenant to the original lessor, but an under Lessee is tenant to the Lessee. 1 Ld Ray 405 3 Wils 234. 2 Bl. Rep 766. The assignees of a Lease are liable on the covenant according to the preceding distinction whether the transfer is made by deed, devise, sale under Exn or any other mode of transfer by operation of Law. As for instance the assignees of a bankrupt & the remainder man of a tenant for life. Doug 177. It has been made a Question whether the assee of part of the premises is liable for the rent or any part thereof, that is whether the rent can in such case be apportioned. As if A Leases to B for twenty years & B. assigns to C a part of the premises, can C. in this case be subjected for the rent, pro rata, Cro E. 633. 766. According to a recent decision he could be subjected. For if the whole had been assigned & he had been evicted of part he might be subjected pro tanto, And by a very strong analogy if but part were assigned he may be subjected for that part, for if it can be apportioned in the one case it may in the other I trust. — 2 Lord 344.

Cov^t to save harmless a form of indemnity.

Covenant Broken.

If a Lessee covenants for himself & his ass^s so long as he continues in poss^n & if he, or his ass^s Continue in poss^n after the expiration of the period he is liable on the Cov^t for tho he is not Lessee nor they ass^s Legally yet as they are so de facto. They cannot renounce the Character to avoid the Liabilities. 2 Lev 167 2 Com Dig 564. "Thus far as to Cov^ts which run with the Land & Collateral Cov^ts. But there is another kind which require Cov^ts to save harmless, under which I shall include Bonds of indemnity. A Covenant to save harmless is one by which the Cov^r stipulates to secure or ~~save~~ indemnify the Covenantee against some damage liability or Charge to which he may be exposed. These Covenants are never broken by the tortious act of another. E.G. a Cov^t of indemnity against suretyship is not broken by false imprisonment of the surety, or Covenantee. Nor is a Covenant for quiet enjoyment which is in the nature of a Cov^t to save harmless, broken by any unlawful eviction. As if Lessor Cov^t with Lessee or ass^t enjoy^t the Cov^t can never be broken by the act of a mere trespasser. Again on assignment of a Lease suppose Lessee Covenants with Less^r to save him harmless from any claim for rent. & the lessor unlawfully distrains upon the goods of Lessee, the Cov^t of indemnity is not broken, but if he had used Lawfull Means it would have been broken. 1 Salk 434. 4 Co 80. Cro C. 443. 1 Mod 219. In a Cov^t to save harmless the cov^s may in some cases maintain action on the ground of his liability to be sued And this as a general is true when the liability accrues after the Cov^t to save harmless is executed. Thus if a Sher^s takes a bond to save him harmless in case of an escape, he may maintain action on the bond at the very moment of the escape altho he has never been actually damnified, on the ground of his mere liability to the Creditor. Cro E 53-123 1 Root 560-11-

Rule

So also if a surety for a debt to be paid in future takes a bond of indemnity & the debtor fails to discharge the debt when due the Covenantee may immediately maintain an action on the bond on the ground of his mere liability tho he has never been compelled to pay. 6 Co. A executes his obligation to B. payable in one year. ~~at the end of the year~~ and B joins as surety. At the same time A executes a Bond of indemnity to B. against his suretyship.

Covenant Broken Bonds of indemnity &c 39

at the end of the year the ~~obligation~~ obligation is not discharged. I may maintain action immediately on the bond tho he has never been sued or called upon to pay & tho he never should be and tho I.S. should sue & collect the money of A. 2 Bulst 234 Salk 196. 5 Co 24 a 1 Roll 597. 2 T.R. 100. But suppose then that after B the surety has recovered of A the original or his bond of indemnity I. S. the Creditor recovers of A in the orig. obligation. Can A maintain indebitatus assumpsit for money had rec'd to recover back the money paid on the bond. My opinion is that he cannot upon the principles of the Com. Law. but his relief against B the surety must be by a bill in Eq. A court of Eq will consider B as trustee to A. 2 T.R. 104-5 1 2 Bur 1063 1 T.R 269. On the other hand if ~~A as principal & B~~ one having obligated himself as surety take a bond after his liability was attached he cannot maintain any action on the bond till he shall have been actually damnified. Or as in the other case if A as debtor & B as surety make an obligation or note on demand & a bond of indemnity is given by A to B no action on it will lie until B has been compelled to pay, otherwise the debtor would be liable on his bond of indemnity, which was executed to secure against a future damage at the instant in which it was made which is a legal absurdity, Cro C 53-123. 1 Salk 196- 5 Co 24. 2 Bulst 434 Roll 597. — If a surety have taken no bond of indemnity he may maintain indebitatus assumpsit for money paid to his use but if he has taken a bond or Cov^t. of indemnity he cannot maintain indebitatus assump. he must resort to his higher remedy viz his bond or covenant Coup 525-7 T.R 100 1 T.R 399- 3 Wils 13-262-346. But when there is no bond of indemnity taken by way of security the remedy is on the implied Cont. & the surety's right of action accrues only on payment or what is equivalent to it res being taken on Ex^n 1 Wils 13. The same ~~rule~~ remedy on the implied contract exist between Co sureties for contribution when one of them has paid the whole or more than his proportion the law in such a case will imply a contract by each to pay his moiety. 2 Bl R 1268-70. Peak Ca 238. 2 Lay 492 1 Vernon 426. When one more than two sureties some of them assume & pays the whole or more than his proportion

Covenant & Broken

he cannot maintain indebitatus assumpsit against the others for their saleable proportion. It is contended by some that indeb. assump. can be maintained against all the others jointly for their several proportions. But this I think cannot be true. For first it is not properly a joint undertaking. And secondly it is a possible ~~[illegible]~~ case & one which may very frequently happen that some of the defendants will have paid some part of that which was due from them as sureties before action brought. in which case it is evidently impossible for a Court of Law to examine and settle the claims of each individual especially in an action by one against all the others jointly. And therefore the Court will not by supporting the action violate the rights of the majority (as the case may be) of those who are parties to it. And again the action cannot be supported against each separately because of the endless litigation to which it would lead. But the remedy in cases of this kind must be by a bill in Chancery.

A Court of Eq will examine the claims of each individual & settle the whole matter in dispute between the parties at once & this is in my opinion a very proper subject for equitable jurisdiction. In support of the affirmation of this Question see Case of Moses vs. Mc Farlund 2 Burrow 1005. Cont see H. Blk. 411-16 & 7 T.R. 269 1 Day 130 4 T.R. 182. 1 H Blk 665

change when good.

We are next to consider a few rules in regard to the releasing of Covenants. In the case of Choses in action generally a release after the assign^t is in some cases good & in others not, i.e. in will discharge the obligation & in others not. The general rule respecting it is this. If the instrument creating the duty is not assignable at Law a release by the original party after the assign^t will discharge it but when it is assignable at Law or in other words negotiable it will not discharge it. Thus if A give to B a note not negotiable a release from A after assi^t to C. will discharge it. but if it is not negotiable such release will be no discharge. The reason of the rule is that the instrument being not assignable the action must be brought in the name of the promisee & therefor a release from him must discharge the action. On the same general principle if the Lessor after assignment of his interest in the reversion releases to the Lessee all Cov^ts in the Lease the assignee may still recover on those Cov^ts the release to the contrary notwithstanding

Covenant Broken Release

because a Lease is an instrument assignable at law
2 Lev 206. Bro C. 503. 1 Vent 345
But where a Lease has been assigned by Lessee it has been
determined that he may oust his own assee of all remedy
on the covts of the Lessor, by a release to the Lessor &
~~a release to Lessor~~ before assee commenced his action.
but after the assee has commenced his action a release to
Lessor will not bar the action by the assignee. This rule tho it
seems altogether inconsistent with the principle of the former
is yet well established on authority Cro C 361. 2 Roll 411
Br Le 308. And it is a general rule relating to covts in gen
that a release by the Covenantee before the covt is broken, tho
in the most general terms, as of all demands claims &c which
are the most general does not release the covt because the covt
not being broken at the time the release was given there was then no
existing Claim or demand, And this could never be construed
to be a release against future demands which might accrue
for by all demands Claims &c is meant all existing demands.
So if A covts to erect a house for B in ten months & after one
month B gives A a release in full of all demands this will
not discharge the covt for it has never been broken & consequent
ly there was no existing Claim for a breach. And if a covt
contain several stipulations some of which have not been performed
& others have, a release will discharge only those which have
not been performed or in other words those which have been
broken. And it is a general rule that all covts which have
been broken may be released. Bull NP 166. 1 Dist 292 b Co J. 99
Allen 38. Salk 171. 2 Shower 90.
But the first "general rule relating to covts in general" cannot I trust
extend to an absolute Covenant for the future payment of money.
for such a covenant creates a "debitum in presenti". Because
if a man executes his note for a sum of money payable on
one year after date, the promisee can not by a release
discharge that note before it becomes due & it can make no
difference that I can perceive whether the obligation is a mere
note or whether it is in the form of a covenant. And it
is a generally true that whenever Debt will lie on an absolute
or unconditional instrument the rule will not hold.
And even in the other case as for C. Q. cov of warranty or to do

Pleadings.

Covenant. [illegible] Pleadings.

some specific act if a release from all Covenants is given before the Cov.t is broken it will be effectual. because it destroys the Cov.t itself & must consequently discharge all demands that ever can accrue upon it. 1 Bl R 518. Dyer 57 Cp Di 307.

Pleadings of Covenant Broken.

I. Pleadings in the Declaration.

In speaking on this subject I shall treat only of those rules which apply exclusively or at least appropriately to Cov.t brok. The declaration in this action must always state that the Cov.t was made by Deed, this is indispensable because at Com Law a Cov.t could not exist without Deed & Seal & if one should Declare without averring Deed it would be ill on demurrer Upon an instrument under Seal Cov.t brok.n is the proper action. case or assump. will not lie. But when the action is on an writing unsealed assump. is the proper action & Cov. Brok. will not lie. Cro C 517. Cro C. 108-209. St 814 In Cov.t broken every declaration after setting out the terms of the cov.t must allege a breach because there must be a breach in order to support the action. Hence the rules

Assignment of breach 1st rule

In regard to the rules relating to the declaration on Cov Brok I would premise that all or most of them refer to the assignment of a breach. The first rule is that if the breach is general a general assignment will be sufficient. As if the grantor covenants that he is well seised & it turns out that he was not in declaring it will be sufficient for the grantee to allege that he was not well seised. Hob 176. 2d Ray 478. Salk 139 Cp Di 298. The most general assignment of a breach is in the words of the covenant itself. As if A covenants in a lease that he is well seised the most general way of assigning a breach is to say that he was not well seised, i.e. by merely negativing the terms of the covenant, Cro J. 369. 9 Co 66. Cp Di 299 At any rate the breach must always be so assigned as to appear on the face of the record to be necessarily & manifestly a breach of the Covenant. Thus where Jessee covenanted to cut no more timber on the land than was necessary for repairs & pff declared that he cut to the amount of £100 this was held insufficient he should have averred that he cut more than was necessary. The Law does not know how much is necessary. And the same would have been the case had he declared that he cut to the amt of £1,000,000

Cro E. 348. Stiles 5. Doug 203. Dy Dr 299.

If Deff. after assigning the general breach narrows & qualifies it by subsequent words, he is bound to it as thus qualified & must confine his proof according to such qualification & can only recover according to his declaration thus restricted & qualified. Thus A Covenants to use Land in a husbandlike manner. Covenantee in declaring on a breach alleges that he did not use it in a husband-like manner but committed waste. After having thus qualified his declaration he could give nothing in evidence but what went to shew the Commission of waste, whereas if he had only assigned the general breach he might have proved any thing whatsoever that amounted to an unhusbandlike use of the Land. 2 D & R. Wherever there is a proviso in a deed defeating the cov^t in certain event, the Plaintiff need not set out that proviso & negation it for it is in the nature of a defeasance & the Defendant may avail himself of it by way of defence. As when the defendant covenants to deliver certain goods at a certain time & place, with a proviso excepting the dangers of the sea, & in this case the Deff is not bound to set out the proviso but need only recite the cov^t & the Def^t may on over plead the proviso, by setting it & avers that the dangers of the sea prevented performance. 1 W. Reg 65. 6 D & R 604. You perceive thus the difference between a proviso annexed to & an exception in the body of a cov^t. The latter is a part & parcel of the same cov^t & as such must necessarily be set forth. The former is merely a condition annexed & intended to operate only as a defeasance. Thus if A Covenants to convey to convey to B. a piece of Land except the interest of J. S. in it. This is an exception in the body of the covenant & a part & parcel of the cov^t itself & as such must be declared upon otherwise the declaration would not be true. 6 D & R 300. And if the cov^t is in the alternative i.e. if it be to do one or the other of two things in declaring on it the breach must be assigned as to both otherwise the declaration will be ill. Thus if Lessee cov^t not to cut wood without the assignment or assent of the Lessor an avowant in action for breach must allege that he cut without either assent or assignment. Both parts of the alt^e must be negatived 1 Leonard 250. Dy Dr 300. But cov^ts which literally & in terms are in the alternative are not always so in

Covenant Broken Pleadings.

Legal effect & in such can the last rule would not apply
Thus on a Covt by one to pay or cause to be paid it is sufficient
to allege that the defendant has not paid. For here the thing
is an alternation in the language yet there is none in the law
because if he has caused another to pay it is the same as tho
he paid himself according to the well known maxim of law
"Qui facit per alium facit per se" 1 St 229. 2 Dr 300-1 —
5th Again when there is a Covt to pay or do some other act on
the happening of one of two contingencies, it is sufficient to
allege that one of them has happened without averring that it
6th is the first 2 Ld R 132, 2 Dr 300. In A Covenant that
an act shall be done by the covenantor or his assigns, if the
action is brought against the assignee, the averment must be
laid in the disjunctive, i.e. that neither the covenantor nor
his assigns have done the act for suppose it was only alleged
that the assee had not performed yet the Covenant might have been
performed by the Covr & the declaration still be true.
But if the action were brought against the Covr it would
in this case be superfluous to aver that his assee had not
had not done it for in this case it is presumed that there
has been no assignment. Salk 139. St 228.
The first rule viz. that the breach must be set forth in
the disjunctive is confined to actions brought against the
assignee. For it is a rule of pleading that it is only necessary
to show a prima facie cause of action.
7th So also on a Covt to do an act to one or his assigns so to make
a conveyance to a man & his assigns in action on the Covt by
the Covt by Covenantee an averment that the conveyance has
not been made to him is sufficient without saying nor his assigns,
because in this case the law will presume that he has no
assignees. But in an action by the assee it is necessary to aver
that the conveyance was not been made to the covenantor
for the reason given in the above case. 1 Salk 139.
3 Keble 440. 5 Mod 133. In Covenant for part of a
8th sum certain, there can be no apportionment of demand. The breach
must be for the sum certain. As when the freighter
of a Ship covenanted to pay £10 per ton for freight, if
the Dft avers that he has not paid for ten tuns & one hogg
it is ill, for he might consistently with the declaration have
paid for every tun. But if the Covt had been to pay "at the rate"

of £10 per ton it would have been good. 2 Lev. 124 Ale 19 Esp Di 303. I would observe however that the the breach to ill on demurrer yet if the Defft would enter his remittitur for the ton hoggshead he might have Judgment for the ten tuns. Salk 658 1 Roll Rep 66. C. Di 303.

III. Pleadings on the part of the Defendt

Thus far my observations have related exclusively to the pleadings on the part of the Pltff. I will now proceed to consid the pleadings on the part of the Defendent,

1st Performance

The most usual plea of defence in the action of Covt broken is that of performance. It has been usual in Covt for the Defts to plead that he has not broken the Covts. And this has been done in some instances in England, and this has been supposed that this was equivalent to pleading performance because it is said if it has not been broken it has been performed. But this plea cannot in any case be good because then every question of Law that might arise is referred to the jury. If it is good the Pltff might in such case reply that the Deft had broken the Covt & this would put no facts in issue to the jury. But that such pleading is not good is established 2 Burr 1186. 2 Mod 33. 2 Blk Rep 1312 Now this is evidently a mode of pleading which is altogether absurd, for no human mind can discern what fact is to be proved. But I find it has been contended by able counsel in Eng. that if after stating a special breach the declaration concludes, "and so the Deft has broken his Covenant" it will be good, for this it is said is putting the facts stated in issue. 2 Bl R 778-81 But I am clearly of opinion that the declaration would be bad as well where there is such an averment as where there is none, for this is not a foundation for issue 2 Blk R 1312.

It is laid down as a rule that when the Covts in a deed are affirmative it is competent for the Defts to plead performance generally as thus to say that the Defts has kept & performed the covts. 1 Inst 303 B. Co Li 303. 6 Bac Ab. This rule however must relate to cases where the things covenanted to be done are in some measure inadequate & multifarious. as a Covt by a Sheriff to return all writs & to discharge all the duties of his office. in action on this Covt it is correct & sufficient for him to reply generally that he has returned all writs & discharged all the duties of his office without specifying the particular acts, because he will then be prepared to meet any special breach that may be assigned in

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the replication Comp 375. 4 Bac 91. But when on the other hand the Deft has cov^t affirmatively to perform a number of acts specified in the Covenant. which is the most usual way. the defendant must plead specially, i.e. he must aver the performance of each specifick act in the terms of the Covt. As if an Ex^r Cov^t to pay all the legacies in the will which he executes it is not sufficient to plead generally that he has paid all the Legacies, but he must plead specially thus he has paid to A, & B & to C. the three legacies & conclude by averring that these are all the Legacies. For without this last averment a compleat issue would not be formed on the record. Because all these several legacies may have been paid & the Pltfs declaration still be true, for it does not appear that these are all the Legacies. This Case is not within rule allowing the plea of general performance, because the particular Legacies are all ascertained by the will. Cro C 749. 1 Saun 117 not. Cro J 359-60. 1 Levins 303. Salk. 498. 1 Sider 219. 1 JR 152. The rule then requiring a special plea of performance to each particular Covenant is the General rule. & the rule allowing a plea of general performance is only an exception allowed to avoid prolixity, burdening the record or as Ld. Coke says "to avoid infiniteness." As in the Case of the Sheriff above mentioned if the Court should compell him to aver specially the performance of every specifick act of duty, they would compell him to do a thing morally impossible.

Comp 375. 1 JR 753. Cro C. 749-916. 1 B. & P. 643 Cro E. 305. And a plea of performance whether special or general otherwise than in the words of the Cov^t i.e. not corresponding or not in conformity to it is ill on demurrer. The reason is that the plea does not disclose a sufficient cause of defence. 1 Sid. 405. As for example in an action against Ex^r on covenant to pay all legacies, it is not sufficient for him to plead that he has paid a Legacy to C. to B. & C. but he must aver that these are all the legacies. &

Thus far of affirmative covenants.

Covenants affirmative & negative.

On the other hand When some of the Covts are affirmative & some negative, the defendant must plead specially that he has not done the acts covenanted against but as to the affirmative covenants he may plead generally according to the rules before laid down, and if all are negative he must plead specially to each

as before. But if the Deft should aver general performance as to the negative Cov^ts it would not be ill on general demurrer but on special demurrer it would. because the plea is correct in substance, tho bad in form. Cro C 233-691 1 Inst 303b Comb 576 Com Dig tit. Pleader C 25-6 Co. L i 303.

Plea the performance of void

If however when some of the Cov^ts in a deed are negative & some affirmative, & the negative ones are void the Deft may plead as tho the negative ones did not exist that is if he plead performance of those that are binding it is sufficient Thus if in a Cov^t by a Deft. Sheriff. containing among certain good affirmative Cov^ts a bad one as E.G. that for example that he will not serve process over a certain amount or in a particular part of the County, in an action on the Cov^t the Deft^s plea will be sufficient if he pleads to the affirmative Cov^ts only and, takes no notice of the void or illegal stipulation. He is not bound to notice them at all & this is indeed the correct way of pleading. 1 Saund 85 117 note 5. 2 Mod 15. Moor 856. When the Cov^t is in the affirmative

Plea the performance

that is to do one of two specified acts, the deft in pleading performance must not plead that he has performed one of them without saying which, but he must specify which act he has performed, because this does not tender issue. 1 Inst 303b Cro L 659. 8 Co 133 1 Saund 117. And it has been said & so decided that if he plead wrong i.e. that he has performed one without specifying which it is ill on general demurrer. but this does not appear to me to be correct on principle, for the plea is not deficient in substance but only in form for if he has done either act he has undoubtedly performed his covenant. I think that on principle it is ill only on special demurrer tho the contrary opinion is supported by authority. Co C 233. Com Dig Plead C 25-6. 1 Lev 211. 4 Bac 91. When one covenants to do some act which consists in what is called matter of law as to make conveyance of land he must not only plead specially that he has conveyed but he must plead "quo modo" i.e. in what manner he has made the conveyance & that it was done lawfully. Doyer 229. 9 Co 25. Hob 67-107.

Plea quo modo or the deed

On the same principle if one Cov^t to do an act which must appear of record as to levy a fine or suffer a common recovery he must not only plead specially but must plead Quo modo. —

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because it is a question of Law what a fine or Com Recov is Cro J. 516. Co Litt 1 Last 303 b. Ga

Pleading on Covt of Indemnity

With respect to Covts of Indemnity there are some pleadings which apply to them exclusively. Upon such Covts the Deft may plead generally, that the Plff has not been damnified in other this mode is not sufficient for he must plead affirmatively that he has indemnified saved harmless &c. and he must point out the Duo Modo. & true the general rule is this. If the covenant

General Rule.

is to discharge or acquit the Covenantee from any particular thing ascertained in the instrument, as if I Covt to discharge one of such a bond or of such a debt or duty contained in such bond, "non damnificatus" is not a sufficient plea, but I must plead specially that I have discharged same bond or debt or duty & that Duo modo. i.e. by what particular act he has discharged him. E. G whether it is by payment or being himself taken or &c or some other way. Carthew 374. Cro E 433. 4 Bac 92. 2 Co 4 a. 1 Saun 117 n. 1 Ba & B 639. Now when the party has Covt to do a specific act he must plead performance specially & if it is ascertained in the instrument he must plead Duo modo. But on the other hand

Exception

if the Covt is general non damnificatus, will be a sufficient plea when there is no specific act Covt to be done for he does not specify the manner but only covenants generally to indemnify. 1 Saund 117 n. Cro J 363-4. 2 Co 4 1 Lev. 194 2 Wils 120. 5 T.R. 309-10

But whether the Covt is general as to save harmless, or particular as to acquit & discharge him of anything not ascertained in the instrument & not specific as costs &c in a subsequent suit non. dam. is a sufficient plea. Because this is not strictly specified Cro E 916. Carthew 374. 3 Mod 252 1 B & P. 639 notes 3 Mod 224. The reason it seems is it is that the damages cost &c from which the Covt is to be acquitted & discharged is a general Covt to indemnify or save harmless for it does not appear that such damages have accrued You perceive then that there is a difference between this Covt and the former one. If I Covt to acquit or discharge you from a particular debt or duty the Covt supposes a particular debt or duty existing. But it does not appear from the Covt to discharge or acquit of costs &

damages that such costs & damages have ever accrued I cannot therefore be bound to plead specially that I have saved you from particular damages which never accrued and such plea would be ill & I should inevitably lose my cause by leaving excepted in the rules of pleading. Non. Damnificatus must therefore be the proper plea. 1 Salk 117 n. Carth. 375 n. 2 Co 3-4 n. Cro J 363 n. 4 n. Cro C 916 n. 2 Wils 126 I have further to observe that where non dam. is good if the Dft will plead affirmatively without any necessity he must plead it specially and show the "Quo Modo" & what the specific act is which he has done. However if the Dft pleads generally that he has saved the Plff harmless without specifying the particular means it will be ill only on special demurrer for substance is good tho incorrect in form 1 Lev 194 n. 1 Saund 117 n. Non dam. is not a good plea to an action on a bond for the payment of money on a day certain even tho it should appear that it was intended as a general indemnity because the cov.t is on the face of it to do a specific act. The plea of performance must therefore be special 1 B & P 638 n. If the Deft pleads non. dam. when it is proper a replication consisting of a general traverse that the Plff has been damnified is ill, the replicat.n must aver & point out the special breach. If then he plead that he has been damnified he must show the Quo Modo otherwise his replication will be ill. 1 Lev 83 n. 1 Sid 464.

Replication

Joint & Sev. covenants

The only remaining subject under this title is that of covts joint, or joint & several — When any number of persons covenant jointly they must all be joined in the action. And if two persons had cov.ted jointly and severally both may be sued together because they have covenanted jointly or on the other hand either may be sued alone because they have cov.ted severally or both may be sued in different actions at the same time. But if three persons covenant jointly & severally all may be sued jointly or either one alone or each in a separate action. But two cannot be sued ~~alone~~ together without the third. This rule is common to all contracts joint & joint & several. Yelv 26 n. 1 Sid 238 n. 2 Ber 99 3 Salk 363 n. 3 Bac 69 n. 3 T Rep 782 n. If there are ~~more~~ two or more joint covenantees or obligees they must all join

Covenant Broken — Pleadings

Joint and several Cov^ts

as Plffs in an action on the cov for if each could bring a separate action the obligor would be subjected to as many suits as there are obligees & that too for one & the same cause of action. This rule applies to all actions on cont. 2 "J.R." 289. And if in such case an action is brought by one alone the Deft may either plead the non-joinder of the others in abatement or Demur to the Declaration 3 Co 18 b. 2 St 1146. If one of two Joint Covenantees dies his Ex^r cannot maintain an action himself nor can he join with the survivor in an action on the cov^t but the entire remedy survives to the survivor But the surviving cov^ee if he recover is accountable to the representatives of the deceased Cro C 729. 1 East 497. 1 B & P 405. When cov^ts with two or more cov^ees jointly and severally in some cases one may sue alone & in others both must join. On this subject Gen. Rule the general rule is. If the interest of the covenantees appears to be several each may sue severally. Thus if one leases to two several persons in one deed as to A. black acre & to B white acre & covts with both jointly & severally that he has good title each may sue alone for in this case the cov^ees interest appears to be several. For in this case A has no interest in white acre & B has no interest in black acre. therefore if the title to white acre is not good A is not injured. 5 C 8-18-9. 2 Lev. 67. 2 b. 160. Bac P 157 1 Saund 153. 2 b. 116. So also on a cov^t or bond for the payment of a certain sum of money to A & B to be divided between them each may sue severally for his part. Cro E 759 1 Chit P. 5. And in this case each may declare on the cov^t as if made to him solely without naming the other. For cov^ts of this kind are the same in Legal effect as a separate cov^t delivered to each of the cov^ees, and when the facts are thus declared by subsequent words as to be divided & the Law treats it as if separated. Cro E. 729 2 St 76 Cowp 732.

When the interest is Joint

But tho the cov^ts are both in one deed and both expressed to be several as well as joint yet if the interest appears to be joint the cov^ees must both join in the action. "Do. if the cov^t is to pay to A & B. severally £100 without adding to be divided between them. they must both join in the action.

and "The rule may be thus generally expressed if one binds himself
Vide to two Covts jointly & severally yet if the interest appears to
be joint they must sue jointly tho the words severally is used
because the question whether they may sue severally depends
upon this, whether there is a severity of interest. This rule
of interest however refers alone to covenantees. 5 Co 18-19
Jenkins 2 6a. 1 Bac 532. 1 East 497. From the rules
already given it follows as a corollary that the obligors
Ollary or co-covenantors may bind themselves severally for the same
thing yet co-obligees or co covtees cannot have several rights
of action for the same cause. Thus if A & B bind themselves
jointly & severally to convey they may be sued jointly & severally
but if A.B. binds himself to release block acts to A & B
jointly & severally he cannot be sued by them severally. For
the Law will not allow several action for one & the same
cause 2 Co 19a. If two or more persons bind themselves jointly
& severally each one may be sued for the default of any one
of the others, even tho he has been guilty of no default
himself for there is a several obligation on the part of each
one to see the covt performed at all events. As if two Exrs
bind themselves to pay all the Legacies & A wasteth all
the assets, B is still liable for the default if A in not
paying the Legacies. For he is considered in the light of a
surety. H 515. And when one of two persons is sued
in these cases, a recovery of judgment against one is no bar
to an action against the other. nor even the taking his body
in execution, for each is responsible at all events for the
satisfaction of the covt & no proceeding against one which
does not terminate in satisfaction of the obligation can
discharge the other. 6 Co 46. Roe (D) 73-4. 3 East 231
5 Co 86. Chit. on bills 134-82. I have before observed
that if one of two or more co-obligees or co covenantees dies
his exec cannot join with the surviving obligees
in action on the covt. So also if one of two joint
covenantors or obligors dies his Exrs is not liable to
an action at Law on the joint covts for the surviving
liability survives to the surviving obligor, and this last may
in Eq recover of the exec his moity. If however a covt
or other cont is joint and several on the part of two

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on the part of those who are bound by it. the Ex's of the rest are bound by it because it is considered in law as a moiety of interest. 1 Cast 484. If two persons covenant jointly or severally the word or is construed as and. For if it were at the election of the obligors they might continue it either way and consequently defeat the action at any rate. 1 Lev 76. Comb 832. Cro or Bills 185-6. If one of two joint & several Covenantors is made executor of the Covt the obligation is released as to both & that in toto. because the Debtor is by this act made the Creditor & it is absurd to say he may sue himself & the Law will not allow him & his partner 8 Co 136. Salk 300. 1 Inst 264 b. 3 Bac 699. In this case however a Court of Eq will compell Payt in favor of Creditors of Covt tho not in favor of his or Legatees Talbot 246 Yelverton 160 Cro C. 393. 2 Bac Cont 254-5. 9 Mod 62. The reason why a Ct of Eq will compel a payment in favor of Creditor is that the debt in the hands of the Ex is bad Assets. and Creditors are always to be preferred to mere Legatees. That is a man must be just before he is generous. But the heirs cannot compel payt because the appointment of a debtor as Ex is in fact giving a Legacy & heirs are postponed to Legatees, under the Statute of Testamentary. If an instrument begins thus- We A & B. Covenantors &c and is signed only by A. he may be sued alone on it, as if it were his sole Covenant for in Legal effect it is so. because he only has executed it. 1 Burr 323 2 TR 32. So also if an instrument recites that A.B.& C. Covenantors on the one part. &c and C did not execute, it may be declared on as tho it was only the Covt of A & B. However it has been the custom to aver that C did not execute. But I can see no necessity for this averment & I presume the declaration would be good without it. 2 Strange 1146. 1 Burr 323. 2 TR. 47. When two or more persons bind themselves in one obligation or by a promise it is joint of course tho the word jointly is not used unless some words are used denoting a several obligation. As we A. B. promise to pay to C. $100 &c here there are no words implying severalty. Nor is the word jointly used yet the instrument is joint of course, it is so prima facie

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(II Strange 1146.) 2 Str 31. 2 L R 1203. 1 Hen Blk 236 - 3 Bac 697
But if a Covt begins thus -- Covenant &c and is signed
by two it is joint and several or several as well as joint.
Coup 832. Peak Ca 130. Chit Bills 175. St. 76-109. vol 809.
2 L R. 1544. 5 Bur 2611.

Title of Bailments

Bailment is defined to be a delivery of goods on a cont. express or implied that they shall be restored to the owner & according to his direction when the purpose for which it is made shall be accomplished. The person who runs the goods is called the bailor and he who receives them the bailee. 2 Blk 451. Jones Bailt 3-48

Every bailt vests a qualified property in the bailee & this principle is of extensive application. It is not merely a power which confers this qualified property but it is every species of bailment indiscriminately. The distinction which is recognized in some of the old books on this subject is not good law. 1 Bac 240 Doc & Stu 124. Jones 112. 1 T.R. 392-7. 4 Co 83. 1 Inst 89.

A mere lawful possession which imports a present right of possession includes in itself a qualified property. to which rule there is but one exception Sh. 875 According to the definition the property is to be restored by the bailee to the bailor when the purposes for which the bailment was made shall be answered. But this undertaking does not subject the bailee to restore at all events & under all circumstances for if there be a loss of the property without his default he is not liable. 1 Bac 236. Jones 8. But to determine when the bailee is in fault reference is had to nature of the bailments & to the conduct of such bailees. Jones 8. Under the present title the principal object is to enquire to what degree of diligence the bailee is bound.

The most general rule is that in cases of general acceptance he must use a degree of diligence proportioned to the nature of the Bailment. With respect to the degree it will be sometimes greater & sometimes less than what is called ordinary care or diligence. for the degrees are indifferently various as will be more fully explained by and by. As to acceptance there are two kinds. 1st General when the degree of care is left by the ~~law~~ parties at large to be ascertained by Law. 2d Special in which there is a particular agreet extending or qualifying the bailees responsibility. All the rules laid down in this title are to be considered as referable to general acceptances. Since the parties may by one that is special stipulate that the bailee shall not be under obligation to use any care, or to use extraordinary diligence & both bailor and bailee will be bound by the agreet.

The standard is what is called ordinary diligence and is that care which rational men use in general use in their own concerns. Jones 9-10. The degrees on each side of this standard are not distinguished by technical terms but are expressed by periphrases as more than ordinary or less than ordinary diligence or care. To every degree of care there is a corresponding degree of neglect or default. Thus the omission of ordinary care is called ordinary neglect of extraordinary care less than ordinary neglect. Jones. 11-13. 30-31 The omission of slight care is called gross neglect & is generally considered as

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conclusive evidence of fraud in the bailee which however is not unanswerably so. It is a mere presumption which may be rebutted. Thus if the bailee is guilty of the same neglect of his own goods the presumption of fraud is excluded 1 Ld R. 915 Jon. 38-55-64. We repeat the bailee is bound to use such a degree of care as the nature of the bailment requires, to the application of which three observations necessary. First. When the bailment is for the benefit of the bailor the bailee is bound only to good faith & is liable only for gross neglect as it is a maxim that he who receives the benefit ought to run the risk. Ld R. 915. 1 Bac 247. Jon 15-32-51-64-101-102. In Southcotes case a contrary doctrine is maintained where it is said that the bailee is bound to keep the goods at his peril but this has long since been exploded 4 Co 83. The acceptance must be general in order to a correct application of this rule for the bailee may increase his liability to any extent Jon 22-3-61-2 Ld R. 916. Secondly. When the bailee alone is benefitted he is liable for slight neglect & is bound to use extraordinary care & for the reason above specified. Thirdly. When the bailment is mutually advantageous the bailee is bound to use ordinary care. The risk hangs on the balance & is equally divided between them Jon. 16-16-23-33-89-101-105 According to the Com Law bailments are of six kinds which division however is not very logical & therefore Sir Wm Jones has reduced them to five. 1st Deposit or Depositum, which is a delivery of goods to be kept for the bailor without reward. There is nothing but the duty of custody incident to it & therefore it is called a naked bailment. Ld R 912 Bull N.P. 72 1 Bac 247 II Commodatum. This is a gratuitous loan of goods to be used by the bailee for his own benefit. In English the proper term is loan for use. The bailor is called a lender & the bailee a borrower. Ld R. 913-15. This species differs from what is known in Law by the name "mutuum" which is a gratuitous loan for consumption & not use & is to be paid in goods of the same kind and not specifically restored, as in the case of a loan of money, of a hire of wine &c or any article of food. An absolute property is transferred from the bailor to the bailee & if the thing is destroyed the latter must at all events sustain the loss. Indeed a mutuum is not properly a bailment Bac & Ab. 129 1 Bac. 241. III Locatio et conductio. Which is a delivery of goods to the bailee to be used for hire or reward & its appropriate Eng. term is "letting to hire" The bailor is called locator & the bailee conductor. Jones 86 199 1 Bac 251. IV. Pawn which is the delivery of goods for the security of a debt due from the bailor to the bailee. The one being called pawnor & the other pawnee. Ld R. 913. Jones. 86-104.

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V. The next kind of bailments is a delivering of goods to a carrier for the purpose of transportation or to have some other act done respecting them for a reward, for which there is no technical denomination. This includes not only delivering to a common carrier but also to a private carrier and a other bailee. La R. 913-7.

VII. Mandate, which is a delivery as in the last case but without a reward, the labor is gratuitous & the bailee is called a mandatary. La R. 913-8. Jones 73.

We now proceed to apply the rules above mentioned to the several species of bailment, & the first is Depont.

I. Depont. This is solely advantagious to the bailor & of the bailee therefor nothing more is requisite than good faith & he is only liable for gross neglect which is presumptive evidence of fraud. Dac L Ste 109. La R. 909. St 1095-9 1 How 247. Bk U.S. 72. Sm 31-645. La R. 915. 2 Bok 1152. St 881 Jones 13-30-64. The language in the authorities on this subject is quite indefinate but the only correct doctrine is this. The depositary is not liable at all for neglect considered in the abstract it is merely evidence of fraud for which he is liable. Thus when a negligent man exposes his own goods as well as those of his bailor the presumption is excluded & therefor he cannot be subjected 11 Serr. 2305. St 1099. Unless by a special agreement the depositary may subject himself to any degree of responsibility. La R 655. 913-911. 3 Reeves Hist. 245-6-394. Jones 67. The opinions were formerly quite at variance with this rule especially in southern case a precedent of which was that while the decision of the Court was correct & good their reasoning was false. 4 Co 83-6. 1 Inst. 89-6 2 Jac 236-241. Co E 818. La R. 655-911-13-14 Comyns Rep 138 35. Bk U.S. 72. Jones 69. Some have taken a distinction between a special agreement to keep with or without a consid. In the former case it is said the bailee is bound but not in the latter. but a mere delivery of goods is a valuable consid. and the distinction above is now explained. Also besides to speak of a depositary's receiving a reward is a solecism & a legal absurdity. 1 Jac 24. La R. 909-19. Doc & Ste 129. 12. Mod 487. 3 Reeves Hist 245-6-394.

It was said in South Cotes Case that if the bailor left a chest of goods with the depositary but kept the Key the bailee is only liable for the chest & not for the goods in case of a loss. This however is denied by by La Holt who says that the bailee has the same power to defend & the same qualified right to them whether he has the key or not. This reasoning seems conclusive when the contents of the chest are known to the party, but if they are not known it seems doubtful how far this liability can be extended. 4 Co 83-4. 3 At 47. 1 Inst 89 a. 6. The above question or authority appears not to be definitely settled. but we may safely conclude that if he

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is guilty of gross neglect toward the chest itself he is liable for the goods therein. A depositary may extend or qualify his liability but even an unqualified undertaking does not at all events subject him as in case of acts of God or unavoidable accident or open violence. of which last robbery is an exam[ple] but in case of mere theft he is liable for a proper regard as might have prevented against it. 2 d Ray. 915 2 Lev. 201 Str. 1264 1 Pow 248 g. Hob 34. Sims 62. 1 Rolle Rep 5

According to the authorities an imputation of fraud is necessary to subject the depositary in case of an undertaking that is unqualified.

III. Commodatum Secondly Commodatum. which is a gratuitous loan of goods for use it being beneficial only to the bailee & of course he is bound to use more than ordinary care & is liable for less than ordinary neglect. Thus if a horse is borrowed & the bailee puts him in a stable unlocked he is liable if the horse is stolen. but if the stable was broken notwithstanding the lock he is not liable for he is under no obligation to keep a constant guard to preserve the property of the bailor 2 d Ray 916. 1 Pow 249-50 B.N.P. 92. 1 Jac 244 Sims 91. In the case of theft not including acts of violence the presumption is against the borrower & he is prima facie responsible Sims 61 92. 2 d Ray 916. But in case of acts of open violence as robbery the presumption is the other way as if the bailee of a horse is robbed on the publick highway the loss will fall on the bailor or lender But the bailee or borrower may make himself liable even in case of a robbery as in case he leaves the highway and passes through by paths where robberies are usual. 1 Pow 251. But the bailee is not liable for losses which happen from inevitable accident such as lightning tempest & fire are examples but he may make himself so even in these cases by a breach of trust, or by a careless & unnecessary exposure of the property to danger. In the former case he is in possession of the property by a wrongfull act. in the latter his want of care the ultimate the not the immediate cause of the loss. Thus if a person borrows a horse in one place to ride to another, or for farming utensils and does not return it at the time then is in both cases a breach of faith & the loss will however it may occur fall on the bailee 2 d K 915-17. Pow 249-53 1 Jac 244 Sims 95-6. Cro. J 244.

IIII. Locatio & conductio Letting & hiring Thirdly Locatio & conductio or letting & hiring which is a delivery of goods to be used by the bailee for reward. By this bailment the bailee acquires a qualified property in the thing bailed & the bailor an absolute right to the stipend or price. 2 d Ray 915 Sims 119. Esp dig 625. This bailment is mutually advantagious & the rent ought to be sure by the parties equally The bailee is bound to ordinary diligence and is only liable for ordinary neglect.

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It is however said by Ld Holt that the bailee is bound to use extraordinary care & is liable for the slightest neglect but this is putting him on the same footing as a borrower & is contrary to the analogies of this title. Jones 31–121–3 It has been made a question whether the bailee is bound to repair an utensil which is the subject of the bailment but it has been decided that he is not bound Salm. 521. 1 Bac 531. Doug 720.

IV. Pawn. Pawnbroker. — Pawn or pledge which is the delivering of goods for the purpose of securing the payt of a debt. Jones 55–104. Ld Ray 913.

If goods are delivered on a contr. the object of which is security & which is accompanied with a right of redemption it is a pawn whatever form it may assume or once a pawn always a pawn in analogy to the maxim once a mortgage always a mort. 1 H. B. 114 The pawnee is only liable for ordinary neglect since then is the same mutual advantage in this as in the last case of bailment: the pawnor securing his debt & the pawnee prolonging or extending his Credit. Ld Ray. 917. 1 Bac 232 Salk 523. Jon 105. In Smith's case Ld Pike lays it down as law that the pawnee is obliged to keep the goods as his own from which it follows that he would not be liable for gross neglect when such neglect extends alike to both, but this is not Law 4 Co 83 Roe & Hull 129. Yel 172. 1 Bac 240 Jones 112 Ld Ray 917. Salk 523 Jones 105–113. — Prima facie a pawnee is answerable for robbery when there has been no breach of trust & no unnecessary exposure Salk 522. Ld Ray 916–7. Jones 61–107–11. It is said even unconstitutionally in Southcote's Case that a pawnee is not liable for mere theft while Sir W. Jones takes the contrary & makes him liable in all cases of theft for he says a bailee cannot be said to have used ordinary care who shall not suffice[nt] vigilance to prevent things being stolen. But this is not true for theft may be committed in the most attentive & diligent manner. Holt in this opinion Sir W. Jones contradicts himself. It is a matter of fact to be submitted to the jury and the doctrine that ordinary care would have provided against theft is false. Ld R. 917–8. 1 Brownl 121 Salk 22. 1 Bac 232. Jones 92. The pawnee like other bailees has a qualified property in the goods but this is defeasable on payt or tender & refusal which is equivalent to an actual payt in its efficacy to revest the property in the pawnor 1 Bac 237 3. Cro J. 244. 4 Co 83. Sid. 72. Yel 179 Lev 111 2 Sid. 84. If after payt or tender the pawnee retains the goods he is guilty of a breach of trust & is of course liable for any loss or injury that may happen through any cause whatever. Salk 523. Ld Ray. 917. Cro Eliz 626 4 Co 83b. 1 Bac 233. The pawnor may immediately sustain an action for trover against the pawnee still the rule is the same if the refusal is by an agent or clerk acting in his regular capacity & employment Cro J 244 Salk 441. Mor 841. Jon 111–26. — In this case the pawnor has his

Bailment. Pawn or Pledge

election to bring either assumpsit founded on the tort or trover as resting on the tort or breach of trust. B.N.P. 72. But he cant sustain either of these actions without a payment or tender of all that is lawfully due from in the case of common consideration. Since both of the actions are equitable as all actions founded on the case are. 1 T.R. 133. A refusal to redeliver on pay or tender is the substantive offence at Com Law which is an anomaly in our jurisprudence because breaches of private trusts are not considered public offences. Salk 522 3 Inst 89. Carth 277. 1 Bac 244. 2 Haw P.C. 210 but this is a mere rule of policy for in the nature of things there is no more criminality in one breach of trust than in another & therefore this distinction is arbitrary. It is intended to obviate oppression as the pawn is usually secret and the man who makes it necessitous. In some cases the pawnee has a right to use the pledge in others not & this right is said to be founded on the pawnors consent either expressed or implied. The presumption of assent depends on the fact whether the thing pledged is made better or worse or not at all altered by the use It is difficult to give an example when the thing is made better but Serj Wm Jones has adduced that of a setting dog whose habits are thereby confirmed and whenever this is true the right is undoubtedly conferred. Jon. 112-3 And it is also agreed that when the pawn is not injured the pawnee may use it but at the same time he does it at his peril he is liable in all events & not even acts of violence as robbery will excuse him. Jewels are considered as examples of this kind of pledge. Salk 522. Bac 237. B.N.P. 72. 1 Roll. 388-673. 1 Inst. 89 2d Ray 917. It is also a principle that when the pawnee is at expense in keeping the pawn he may use it to reimburse that expense. Thus if a horse or ox of oxen are pledged he may use them as a compensation for their food. Auth supra. 2d Ray 916. C.B. Lit. 625. Here it has been questioned whether the pawnee is obliged to account with the pawnor for the benefit which he has derived from the use but there is nothing in the books which goes to establish this liability Jones 115. When the pawn would be injured by the use & the keeping it is not expensive, the pawnee is not from the nature of the case entitled to use it. As a pawn of wearing apparrel for the security of a debt. 2d R 917. B.N.P. 72. Jones 113. As in this case he has no right to use, if he does so such user is ipso facto a conversion & the pawnee becomes liable to an action of trover. 3 Bac. 257-266. The pawnor is not obliged to wait until the expiration of the time of pay but may commence his action at any time. The law in relation to pawns is applicable to goods found & there is an implied engagement on the part of the finder to in every ordinary case. 2d R. 917. 1 Bow 252. - -

Bailments — Law of Sledge

There is a case in Cro E. in which it is said that the finder is not liable for any negligence however gross but this is a mere dictum & certainly is not law. See Cro. E. 219. Cp. Lit. 599. 2 Rust. 21. Leon. 123. 1 Bac 243. — All these authorities sanction the same doctrine with the case in Cro E. — In support of it, it is insisted that there is an analogy between the finder & depositary but there is a plain distinction between them, the one is a mere volunteer the other not. The one comes into possession of the goods without the privity or assent of the owner. the other with it. in the one, he has reposed no confidence in the other he has. There is therefore policy in compelling the finder to use ordinary care. In Com. the finder is clearly liable for the omission of that degree of care as he can claim a compensation by Stat. 5 & 6 E.

In Cro E. the Successor was that lower would not lie against the finder for negligence to the correctness of which I assent for trover is grounded on a tort that is a misfeasance & can not be sustained on mere non feasance 5 Co 146 5 Dur 218. Co. Lit. 89. — Hob 251. 2 It is well settled at Com. Law that the finder has no lien on the goods found for trouble and expense & if he refuse to deliver on demand & production of sufficient evidence he is liable in trover. 2 Stk R 1117 — 2 H. B. 254 — H 657. But a different doctrine prevails with respect to salvage of goods wrecked at sea & in a state of abandonment, but this is referrible to a principle of the maritime Law. Lee Rep. 293. 2 H. B. 254. 5 Bac 240.

It has been made a question at Com Law whether the finder can maintain an action in any shape to recover a compensation for his trouble or a remuneration for expense. The act is nothing more than a voluntary courtesy & therefore there is no principle on which a recovery can be had. 2 H. B. 258 Hob 106. Cro 87. 90. — A refusal is not of course a conversion as the claimant is bound to produce reasonable evidence of ownership 2 Bulst 312. Cro. 390

A finds the goods of B & C a third person claims them who on refusal brings an action of trover & recovers their full value by false evidence. Subsequently B. brings an action for the same goods. Quere Can he recover against A or is the first recovery a bar to the second action. There is no decision in point on this subject but there are some analogies for which see 3 T.R. 125 2 Jac 11. Doug. 161. 1 H.B. 669-682. 2 S 403. 1 Root 445. If upon under & refusal the pawnor has brought trover & recovered the pawnee may after demand of pay! sustain an action for the recovery of his debt. 1 Bulst 29-31 1 Bac 238. If perishable goods are pawned the pawnee does not loose his debt though depreciation or decay since the parties have mutual remedies & in no case is the pawn substituted for the debt. 1 Inst 209. Salk 522. Yel 179. 1 Bac. 238.

Bailments. Pawn or Pledge

And even if the pawn remain unimpaired in the hands of the pawnee he can sue for his debt & recover pawned them be no agreet to the contry. 1 Vt. 919. Yelv. 179. 2 Lev 116 Cro. Eliz. 86. If the debt is not paid at the day the pawn becomes absolute in the hands of the pawnee but the pawnor has a right of redemption in Eq. in analogy to the Law of mortgages. Shep. Touch. 166. 1 Inst 205. 2 Ver 691-8 3 Atk. 395. This right can only exist while the goods remain in the hands of the pawnee for if he should sell them absolutely the property of the purchaser would be indefeasable 8 John. 96-8. 5 S. 258. 1 Ver 348. There is a difference between a pawn & a mortgage of a personal chattel as in the latter case there is no eq. of redemption. Ruth. supra. In the case of a pawn the right of redemption extends after the day of payt tho. it was stipulated at the time of making the cont. that on failure it should be considered as a sale, in pursuance of the maxim once a pawn always a pawn. 2 Ver 698 1 Bac 238. 1 Sch. & L. 114. A factor cannot pawn the goods of his principle so as to give the pawnee any lein against the owner for the lein in this case is merely a personal right & cannot be transferred since the cont. between factor & principal is fiduciary. And if such goods are pawned the owner can sustain an action without even tendering the balance due the factor 2 Str 1178. 3 T.R. 604. 1 Sch. & L. 362. 7 Cr. 8.

On failure of payt at the day the pawnee has a right to sell for then an absolute right to the goods is vested in him. 1 Inst 205. According to some opinions he has a right to sell or assign even before that time. Cro. 124. 1 Inst. 89. 31. 1 Ja 239. But these opinions cannot be correct as every bailment implies a cont. that the property, which is merely personal between bailor & bailee. Besides; a doctrine the reverse of this is inseparable from cases still earlier. See Cro J. 244 Yelv 178. 5 T.R. 606. 7 Cr. 6.

The practical consequence of a decision on this point is important for if there can be no assignment the pawnor cannot be obliged to make payment or tender to the assignee & besides the pawnor would by such an act be guilty of a conversion & trover might be maintained against him.

Reasoning from analogy it ~~cannot~~ is evident that an assignment cannot be made before the day limited. for 1st a pawn cannot by an act of the pawnee be forfeited. as treason or felony. But a man always does forfeit by these acts all that he can assign. It follows then that the pawn is not assignable before the day of payt has arrived 1 Bac 238 1 Inst. 8. 12 Co 12. Cro C 556. 2 Bac 376-7. Sg Brooks also it is laid down that the pawn cannot be assigned or aliened as he says. which see quotes 1 Br 359. 1 Bac 239.

2nd A pawn cannot be taken in Ex. for the debt of the pawnee.

Bailments. — Law of Pledge

it cannot be assigned by operation of law which is a strong analogy to prove that it cannot by an act of the parties. 1 Rep. 238. 352. Dy. 76.6 Co. 124. the above analogies as well as direct principles go to show that the pawnee acquires no right of assignment until the expiration of the time. If he could thus transfer the rights the pawnor would be subject to the danger of a loss. an idea which governs all fiduciary Contr. as by insolvency of the assignee. The case of mortgages is different for land cannot be encumbered nor destroyed nor at all injured by the knavery of the assignee. There is a case in 2 Ca. Eq. 8 which would seem to prove a contrary doct. but upon investigation it will be found not to interfere with the opinion above expressed. On the other hand the pawnor may forfeit his interest in the pledge for he has a general & not a qualified property, but the King or publick cannot take it without paying the pawnee all that may be due him. 1 Bac 238. 1 Salk. 29. Yel 177 It was formerly consid. essential to the nature of a pawn that the delivery should take place at the time the debt accrued, but now the time of delivery is altogether immaterial. 2 Lev 36. 1 Bac 238-9. Yel 164. 1 Ro. 339. D. N. P. 33. 1 Salk. 68. It was formerly doubted whether there could be any redemption unless tender or payt was made during the joint lives of the parties when no day of payt was fixed. Cro. J. 244-5 2 South. Sup. It has been made a question whether if a pawn is assigned to J. S. for a valuable consid. and the pawnee dies the tender or payt. must be made to the ex. of sd. pawnee or to J. S. himself But the resolution of this question depends upon the one antecedent to it whether a pawn is assignable or not. Yel 178. Bul 29. But when no time of payt is fixed it must be redeemed during the life of the pawnor South. Sup. The rule fixing the life of the pawnor as the period of redemption is positive & the reason for adopting it is because some time must be designated in justice to the bailee & for the sake of certainty & general convenience. But in Chanc. there is a right of redemp. after the death of the pawnor unless indeed the parties have stipulated to the contrary, for then is the right of Eq. when the time is fixed by the parties & why not when limited by law 1 Bac 239. 1 Salk. 29. — Bailment of the fifth kind is a delivery of goods to a person for the purpose of transportation or to have some other act done concerning them for the sake of hire or reward. This species is a delivery to a private carrier or other person & also to innkeepers also to innkeepers & com. carriers, or others exercising some publick employ. Str. R. 917-8. Jones 132. Bath. But as the rules in these cases are different it will be necessary to treat of each separately —

Bailments.

The first species is a delivery to persons who exercise some professional calling, or do not as to a ~~Common~~ private Carrier, a tailor, a factor or a common agent or clerk. 2 L R 918. Jon 50- 128-9. - A private bailee is prima facie excused for loss by robbery with the same qualifications as before mentioned. Jones 124. Co Lit. and the rule is the same is the rule with all private bailees whether they be tailors shoemakers &c. &c 2 L R 918. Holt 131. 4 Co 84 and we must he is excusable or not according as he has used or omitted ordinary care. the presumption however is against him. 2 Ld Raym 918 Burt 1811 2 Ld 1404. Jones 136. If the property bailed is destroyed by the ~~Sandbox~~ of the Bailee he is liable for it is want of ordinary care not to have provided against it. Jones 141-2. 3 Bulk 6. and this rule is common to every bailee who receives pay or compensation. It is said by Jones that silver delivered to an artificer is not properly a bailment but rather a mutuum and vests an absolute property in him so that if there be a loss he must as in all similar cases sustain it. Jon 89. 103. Hence also he holds that the artificer may use the silver for any other purpose if returning an equal quantity of the same quality. The reason he assigns is that the form of the property is to altered by fusion that it can't be distinguished or identified and if so cannot in judgt. of Law be specifically restored. 2 Ld Raym 918. Holt 138. It seems difficult to deny this artificial view of the case but I am still not satisfied that it is good law, for suppose it can be identified and is lost or that it is lost before fusion. There seems to be no reason why the bailee should be liable if he has used the diligence required. The operation of the principle would in many cases be extremely rigorous. When the bailee is to do some professional business the Law implies a two fold cont. 1st That he will use ordinary care in keeping and restoring the goods & 2nd That he will exercise a skill equal to the correct performance of the work But if the act to be done is not professional the latter engagement is never implied & he cannot be subjected for any defect in the work without an express cont. to that effect. 1 Ld Raym 738. 11 Co 54a 3 Bulk 103-6. Saun. 324a Cro Eliz. 601. Jon. 128-9-37-40. -

If the work to be done is unfinished at the time of a loss which has happened through the carelessness of the bailee there seems to be no reason why he should be entitled to wages for what he has done for the bailor was not received any benefit from it and has too through the carelessness of the Bailee 3 Bur 1592-5. Ei D. 86.

Of Common carriers - - - A common carrier is one who makes it his business to transport the goods of others for hire

Bailments. — Of Common Carriers —

as a Cartr. Porter, a waggoner, a boyman, a ferryman, and a master of a vessel 2d R. 918. Dyer 116 b. 51. 4 Co. 84. It was formerly doubted whether any one but a carrier came within the description of a Com. Car. but it is now well settled that it is immaterial whether the transportation be by land or water. 2 Ld. 178. Cro. E. 330. 12 Rhod. 487.

The owners & masters merely the masters of vessels are Com. Car. and the bailor may in case of a loss sustain an action against either. Salk. 440. 1 Ld. R. 182. 78. 3 Lev. 259. Carth. 62. 1 Show. 29. 181. E. E. 623.

In Eng. there is a Stat. which limits the liability of the owners to the amt. of the value of the Ship and freight in case of loss through the negligence of the master or mariners, but this is a municipal regulation. A Com. Carrier having the necessary conveniences & being tendered his price refuses to carry. It is liable to action in the case for by his being employed he has engaged to accommodate the publick and cannot therefore peremptorily refuse. 1 Bac. 344. Dal. 76. 3 Salk. 16. 2 Show. 327. But a Com. Car. has a right to make a conditional acceptance E.G. he may give notice that he will not be responsible for money & other valuable property contained in parcels unless he has notice & is paid for the same, but he cannot annex any condition at his pleasure as that he will not be answerable for any negligence of his servts. &c. but the condition must be reasonable & consistent with the publick good. 6 Mod. 2. 98. E. E. 622. At a late supreme Court of U. S. the owners of a Stage were subjected to a considerable amt. of damages which accrued thro' the negligence of their drivers to the property or persons of passengers. Since that with a view to remove this liability they have given notice that they will not be responsible for the negligence of their drivers, but this can be of no avail "nemo sibi" in the case of Com. Car. is beneficial to both parties. & therefore by the usual rule they would only be liable for ordinary neglect &, this seems to have been the case so late as the time of Henry VIII. (Dyer 140) but during the reign of Elizabeth their responsibility was extended & they are now considered as insurers. 4 Co. 84. 1 Roll. 2. Dyer 144. 1 Bac. 345. There are only three exceptions from a universal liability & these are when the loss arises 1st. From the act of God. 2d. From an act of the Kings enemies. 3d. From the act of the Bailor himself. 2d R. 918. 3 Mar. 1793. 2 Ch. Ca. 70. 1 Ld. R. 247. 1 Str. 649. 1 Str. 293. Salk. 15. 1 Wils. 281. The true foundation of the Law on this subject is publick policy which works an exception to the ordinary rule the object of which is to prevent an abuse of the confidence reposed in Com. Car. & to obviate the danger of fraudulent combinations or pretended robberies. 2d R. 918. 1 Ld. R. 35. Salk. 143. E. E. 618.

Bailments. — Of Com^n Carriers

In southcots case Ld Holt assigns another reason for this liability viz. because he recieves a reward but this is not correct because he would then stand on the same footing as other bailees & be liable only for ordinary neglect (Cro. E. 489. 1 Ld Ray. 914. Ca. Ld. 621. The act of God is something which cannot happen through the intervention of human agency or in other words it is inevitable accident 1 Bac. 33. 2 H. 128. Fire occasioned otherwise than by lightning does not come within this description 1 Bac. 34. 2 Ld. Ray. 915. Ca. Ld. 620. It has been decided that a com. Ship. Carr. is liable for damage done goods by water which entered his ship through a hole made by a rat 1 Wils 281. Str. 654. A com. Carr. cannot excuse himself by alledging an act of a mob or rebels since these are not publick enemies within the rule but piracy on the high seas is a good defence since that is an act of hostility to every community 1 Bac. 34. But fresh water piracy or robberies in the harbours & rivers is no excuse. 1 Bac. 34. 1 Bulst. 196. 1 Mod. 85. If it becomes necessary through tempest to throw goods overboard the carrier is not liable for this necessity is imposed by inevitable accident & altho. he is the immediate yet he is not the ultimate cause of the loss. 2 Roll 566. 1 Roll Rep. 79. 2 Salk 282. Doug 737. Cald. 620. When goods are thus thrown overboard the Captain freighters passengers & owners must average their loss among themselves according to the principles of the Law Merc. 3 Bac 394-5. 1 Ett. 220. Dow Dec Merc. 148. 2 T.R. 667. If a com. Carr. unnecessarily exposes the property to danger by the act of God or a publick enemy he is liable as if a Wayman should put to sea in very tempestuous weather 2 H. 128. This doctrine is recognised in a late case (Williams vs Grant). The bailee is excused when the loss springs from the act or default of the bailor as when a person sent a pipe of wine in the act of fermentation by the carrier 2 W. Bl. 69-74 Ca. Ld. 621. And in other cases when the cart waggon was full & the owner forced his goods upon him & a loss ensued, he has not been subjected 1 Bac 344. 2 Show 127. In order to charge the carr. in any case the loss must ensue while the goods are in his possession or under his immediate control & if the owner sends his servant to take care of them they are not properly in the custody & guardianship of the carr. which is necessary to his liability. Even in that case he may sometimes be liable on account of some default as when he goes to sea in a vessel that is defective. Ca. Ld. 70. 2 Show 327. 2 H. 630. 1 Bac 344 But when the goods were delivered to the master & a passenger was requested to take the oversight of them the former was held liable

for his possession or control was not thus taken away. 1 Roll R. 5 pl. 5 Hob 17. A com. car. the ignorant of the contents of a box is liable in case of a loss unless there be a special acceptance Bac. Ab. 7. 2 Est 128. St. 155 Carth 485. Shores 143. 1 Lee 345. In case of a depositary this rule was questioned & an opinion was expressed that he could not be subjected unless he was guilty of gross neglect towards the box Bills but in the present instance the case is different in the depositary acts for the benefit of only one of the parties and the com car for both & besides it is well settled that his liability does not depend at all upon his care or diligence. In two cases it has been decided that the carr. is liable tho misinformed of the contents of the box & that too where there was palpable fraud in the owner see Allen 3. 1 Bunt. 238. 1 Bac 345. 3 Kep. 135. Doct & Stu 130. This doctrine has however been disproven & overruled by Lds King & Mansfield, on acct of the fraud of the owner. 4 Burr 2300. 1 Est 610 Lee 148. St 145. In order to make a special acceptance, personal communication is not necessary. a mere notice in the public papers is sufficient. It is not "per se" a special agreement but merely evidence to the jury of the fairness knowledge of the terms prescribed by the Car. and of his assent to them. 4 Burr 2298. Carth 485. Bac. Ab. 7 pl. 1 1 H.B. 293. 8 T.R. 521 n Ds. Dig. 622.

"In the rules already laid down it appears that a com. Car is liable for the amt of goods he receives tho. ignorant what that amt may be. If however there is position proof in the owner of the property, a different doctrine prevails but under a qualified accept he is only liable for so much as he agrees to carry or for that to which his reward extends Carth 485. 3 Bac. Ab. 70 pl 1 Ds. Dig. 622. When a com. Car. had given publick notice that he would not be answerable at all for certain valuable articles except on certain conditions with which the owner neither complied nor gave information at the time of the amt. of the property, he was held not liable for a loss which ensued not even for the sum which was stated to be the value of the goods. The conditions in this case are different from those in the former, in the one he gives notice that he will not be liable at all unless he has true information, in the other that his responsibility shall only extend so far as his reward does. 1 H.B. 298.

"The owner of a stage coach who receives pay for the passengers only & not for their baggage is not liable as a com. car. but on the contrary, if he actually does receive a compensation for the baggage as well as passengers he is liable. Com Rep 20. Salk 282 Bac. Ab. 70. Ds. Dig. 622 n 4 & 9 Show. 128. 1 Bac 344. —

Bailments (Com Carriers)

Com. Car. is liable whether he has received his hire or not & even without an express promise to pay for it in that case he may rely upon the implied promise & bring a quantum meruit. 1 Bac Ab 463. 4. He is not indeed obliged to carry without his pay in advance but if he does his liability is not affected but remains the same. The rule is subject a common. It is not necessary that the goods should be lost in transitu, but it is enough that it take place at an end & this clearly appears to be the case if the course of business requires that he should deliver them to the consignee. And the same if there be no established custom with respect to delivering or in every instance he is prima facie liable & the onus probandi falls on him to show a custom that will exonerate him. 2 Salk. 655. 1 Ld. Raym. 646. 12 Mod. 482. When the custom is not to deliver to the consignee he is not liable from the time the goods are deposited in pursuance of that custom, i.e., he is not liable as Com. Car. for if he has a ware house of his own he may rest & himself in another character but if the ware house is not his own his liability ceases entirely. 4 Taunt. 781. 1 L. Raym. 738. If the consignee directs by what carrier the goods are to be sent, the consignee & not the consignor the purchaser & not the seller must bring the action in case of a loss for the former is the bailor & not the latter the first is principle, the last a mere agent. 7 T. R. 330. Cowp. 794. Peake 35. 1 Bac Ab 343. 2 Esp. 576.

But when the consignor selects his own Car. the right of action is in him, as there is no privity between the consignee & Car. the bailee if the consignor takes the risk of the conveyance on himself & becomes liable to the price he may maintain the action the consignee does designate the Car. 1 Bac 268. 1 T. R. 659. 8 Mod. 33. With regard to the joinder of the necessary parties in bringing the action & as to the manner of taking advantage of a non or mis-joinder &c. Salk 441. 5 Taunt 651. 2 Esp. 623. 3 Burr. 2611-14. A common Carrier is considered a Com. Car. & indeed liable as such this was on the ground that he was not a public officer but since he has been invested with that character by Stat (12 Car. 2d.) a contrary doctrine has prevailed. He is a mere executive officer makes a contract with no reasonable wages from those who deliver him letters Salk 11. 2d R. 646. Holt Com. Law 764-5. Salk 13. Com. Car.'s have usually been said to be liable on the custom of the realm on which it has been usual to count in the declarations, but this is unnecessary for the customs of the realm is nothing but the Com. Law. 1 Sid 245. Holt 13. 1 T. R. 33. 3 Mod 227. When property is stolen from a Com. Car. or otherwise lost from non-performance the remedy is a special action on the case, but if he is guilty of a misfeasance or tort the remedy is trover.

Inkeepers. Inn Keepers

then when he does a trade gratuitously some of the ask for the hire a room in the whole. 8 Co 146. 3 Term 282 7. 5 Bac 257. Dalk 199. Ld Raym 738.

Next we shall treat of Inkeepers. A delivery of goods or baggage to Inkeepers is a bailment of the 5th Kind & of the broadest sort when the goods are delivered to persons exercising a publick employt. This bailt has no affinity to commodatum as alledged by Spinoza nor does it resemble a mandate as thought by Bullen. Jones 134. 8 Co. Di. 675-6. Bac. Ab. 3 for within our definition of it as a delivering of goods to one exercising a publick employt & in fact for a reward & therefore one within this fifth species of bail. The general law in regard to Inkeepers will be treated of in a special Title by itself but now I shall consider them merely as bailees & keepers of the goods of their guests. The bailt in this case is mutually advantagious & therefore by the general principle the Inn Keepa is bound only to ordinary care & is liable only for ordinary neglect. But the policy of the Law has extended his liability somewhat further than not so far as that of the Com. Car. Jones 133-4 5.

In the first place he is clearly liable for the act or default of his Servt in all cases for he is bound to provide those who are careful & honest. 8 Co 32-3. Ld. K. 738. 1 Salk 430. Ld. R. 626. Masters in general are not liable for the wilful or positive torts of their servts but Inn Keepers are not only so for their torts but also for their crimes & felonies. Likewise if the loss is occasioned by strangers there is the same liability which is as said of policy & calculated to prevent combinations as in the case of Com Car 8 Co 33 a. Cro J 189-294. 5 T R. 276. If even the goods are stolen by the owners sons or companion or one who lodges in the room at the owners request the Inn Keeper can not be subjected. Cro C 285 8 Co 33 Sac 183. Ld R. 625. So also are Inn Keepers liable in case of common robbery which if correct & on the same principle of policy. Roudon admits this by a negative pregnant & Jones says that nothing will excuse but a force both irresistable. This it is presumed will not carry his liability so far as that of a com car which it once will cause him in many cases of losses occasioned by a more determining power than the strength of it & the force with which he might have resisted their depredations. 8 Co 32 a. Jon 135. Com Dig. 3 Sac 182.

But altho the law does not extend his liability so far as that of com car yet in the nature of the case there is no reason why it should not be for certainly he has incomparably more advantages to defend the property against violence & equal if not greater opportunities of combination by collusion with the thieves and Robbers.

Bailments. Of Inn Keepers & Mandate

Lord Coke says indeed that there must be some default in the Inn Keeper & his servt in order to subject him but this confines his liability merely to cases where the loss has accrued through a want of ordinary care and is therefore plainly incorrect. See 8 Co 33. 5 Term Rep 276 Ellis v Turner. The Inn Keeper is liable only for such goods as are infra hospitium within the curtain which includes not only the dwelling house but also the stables & other out houses 8 Co 32. If however the property is removed at the request or by the direction of the owner the Inn Keeper is not liable for loss without actual default. as if a stranger should order his horse to pasture & it is stolen the Inn K. is not liable ~~without actual default~~. but if the horse escapes thro' a defect in the fence he would be. But if the horse is put to pasture by the Inn K. of his own head he is liable however the loss may accrue. 8 Co 32 b. 1 Roll R 2 Ventr. 173 E. L. 626 7.

VII. 6th Bailment of the last kind is what is called mandate or mandatum. Which is a delivery of goods to be transported or some other act done with them without reward or hire. It is sometimes improperly called acting by commission. The bailee is called a Mandatary. Jones 76-73. 2 Ld R 918.

Mandate

The difference between mandate & deposit is that the latter consists in mere custody the former wholly in feasance. The rule in regard to care & diligence in both cases is the same & no greater care is required of the mandatary than of the depositary in which case there is not to excuse them from the imputation of fraud. 2d R 909 Jones 19 1 Bos Pull 265. 1 H.B. 158. 161 a.

This was the decision of Bailt which came under consid— in the case of Coggs & Barnard in which case was recog^d the principle that when there was a special agreement to use all necessary care & the loss follows through the omission of such care the mandatary is liable tho' the act to be done be gratuitous. 2 Salk 199. Jones 75. An agreement to use all necessary care may be in some cases implied but the subject matter of such implied contract must be strictly professional. — Thus if a tailor should undertake to do a piece of work gratis he would be bound to do it in a workmanlike manner & would be subjected to damages on failure. 3 Blk 165-6. 1 H Blk 158. 11 Co 54. 1 Saund 324. Jones 159. Sir Wm Jones takes a distinction between the duty of a depositary or mandatary where the thing to be done lies in feasance & where only in custody or transportation & requires a greater degree of care & skill in the former than in the latter case —

Bailment — Mandatary

But there seems to be no solid grounds for this distinction for it places them on the same footing in the case allowed to with bailees who receive a reward. 3 Bl. K 165-6. 1 H. B 158. In the case in H. Bl. 158. La Loughboro. that when the agent is to do an act skilfully the omission of that skill is gross neglect which is equivalent to fraud. "Thus if a bailee should undertake to provide against robbery & there should be a loss from this source the law according to this opinion would pronounce it a case of gross neglect." But this confounds all distinction between different degrees of care & annuls the whole system of the system. The Judge appears to go upon the idea that no bailee can be subjected except to gross negligence, when is attributed unfortunate for if the case or nature of the cont. require it he may be responsible for ordinary or even slight neglect. And indeed there is no propriety in calling the neglect gross when the loss is occasioned by violence as in robbery & it is the same as to say that a man is guilty of fraud who thro. misfortune is unable to pay his debts. Pow Cont 255.

When there is no engagt. express or implied to use care or skill the party is only liable for the party is liable for the higher species of neglect. "Thus A agrees to enter the goods of B at the custom house together with his own for exportation & in doing this is mistaken the proper name so that the goods of both are forfeited. It was held not liable for the transaction excludes every idea of fraud in it. Pow Cont 255. 1 H. B. 158. With regard to the law that requires all necessary care to the performance of an act which is professional this. it be gratuitous. I would observe that it is to be received with some limitations. It is strictly confined to the act stipulated & does not extend to any loss which originates in causes extrinsic to that act. Thus a tailor is bound to use skill in making a garment in pursuance of a gratuitous engagt but is not obliged to provide against thefts and robberies for the preservation or custody of the goods is no part of his profession. In this last case then he is in the same situation as other mandataries and is only liable where he subjects himself to the imputation of fraud. When there is an express engagt by a mandatary to carry a thing safely he is not liable for a loss thro. inevitable accident or irresistable violence as robbery but he only engages to use all necessary care & diligence & therefore it will be necessary to show a degree of neglect or default Ld R 910-15 Jones 62. A mandatary cannot by an express agreet or condition exempt himself from liability for fraud as the cont. would be contra bonos. mores & therefore void Jones 66-75.

Bailments of Mandate

In the authorities there is some contrariety of opinion in regard to the liability of the mandatary on his cont. consid^n as a cont^ee some thinking it a mere nudum pactum without consid^n & therefore if no force in itself & therefore there would place his liability solely on the ground of fraud. But it appears to be clear on principle that upon delivery he is bound by the cont. as much for the delivery alone is a suf. consid^n 2 Ld Ray 909-10-19-20

If one agrees to become a mandatary of another that is to carry his goods gratuitously and retracts before delivery he may well rely on a want of consid^n as a defence, but afterwards no such defence can be made the nakedness of the cont. is then covered & it becomes valid in a court of justice. 1 T.R. 163n & it is said by L^d Holt that delivery & receipt of the goods is a sufficient consideration 2 Ld Ray 938 1 Bac 241n 1 Vin & Abr. 129n 12 Mod. 487. 5 T.R. 149. 50n 1 Pow 364. Cro J. 667. Contra Cyc 42 128n Sir W^m Jones remarks that when a person receives special damage by a refusal to execute the agreem^t he is liable tho such refusal be before delivery. (Jones 76-80). A is going to N.Y. & promises B to carry a letter but does not go & B sustains a loss. According to the above principle A is liable for that loss. But there appears to be no principle on which an action in such case could be sustained. If there was a prior paid or any agreem^t to pay, or an actual delivery or any fraud in the party contracting, he would indeed be liable. In the person injured might rely on the cont which is supported by a valuable consid^n & in the last on the tort or misfeasance (on one of which viz a contort tort) every action must rest. But we exclude the tort or fraud by supposition & as for the cont it must be good or bad originally & cannot be affected by matters "ex post facto". But it is agreed by Sir W^m Jones that the mandatary will not subject him unless there is special damage which is a virtual admission that there was no cont at all between the parties originally & how then are these special damages which arise at a subsequent period & have no necessary connexion with the transaction to have such an operation as to create an agreem^t for the parties when it is confessed they have not entered into one themselves. 4 T.R. 310-319. 3 Est. 140-49-150. 3 Est. 62.

It now remains to consider some miscellaneous rules applicable to bailments in general and the first enquiry is in what cases is the bailee entitled to a lien against the bailor which is an incumbrance on some special property being always accompanied with possession of the same.

Bailments. Of Lien

Care must be taken to distinguish it from a qualified property as the latter may exist without the former this former cannot without the latter.

The doctrine of liens extends to bailees of the fourth & fifth classes only embracing all of the fourth & most of those of the fifth. The fourth class of bailees it will be recollected is pawn or pledge in which a lien is created by a delivery of the goods & is in fact required by the very terms of the Cont. The object of it a security of a debt which cannot be obtained in any way but by this law of lien & therefore the bailee has a right to hold the property in all cases tile the debt is paid Bro. J. 246. 5. Yel 178. Salk 522. 1 Ch. Cha. 419. Es. Dl. 583.

Most of the fifth class of bailees as has already been mentioned are also entitled to the right of lien by way of security for the debt or wages due them. The object is not in this case as in the last the creation of a lien but the transportation of property, but a right of wages is acquired by this transportation to which lien is incidental. By a condition in law annexed to the bailment he can retain the goods until he receives the reward of his services. 3 Bac 185. Hob 42. But the certain bailees are entitled to a lien yet a third person who gets possession of the goods wrongfully cannot avail himself of it. The bailor may demand the property of him without paying what may be due to the bailee 2 TR 485. 3 Ent. 585.

To descend to particulars. In the first place a Com. Car. has a lien or right to retain the goods until he receives his reward. La R. 752. 876. 5 Burrow 2832. 5 Bac 269. Salk 654. 2 Ld. Rep. 64. Cont. La R 64. Thus if goods are stolen & delivered to a com. Car & by him transported he can retain them against the true until paid his regular price who must resort to the wrong doer for his compensation. The reason is the Com. Car is compelled by law to receive the property when offered & therefore as the law places this obligation upon him it is reasonable that he should be paid for his trouble. Sel Ray. 867. (Sed Query whether this is the true reason. Ed Bailm.)

Secondly the Inn Keeper has a right to detain the horse of his guest until paid the expense occasioned by such horse. For as he is obliged like a com. Car to receive the animal this right is given him to secure the pay. La R. 868. Ld R 947. 3 Bulst 268. Salk 388. 8 Co 147. 3 Bac. 185. The same law also when the horse is taken to him by a stranger or any wrong doer. Yel 67. Pop 125. 79. Cro. El. 584. The Inn Keeper may detain the person of his guest until the whole bill is paid, whereas the right of keeping property is strictly confined to the expense which

Bailments. — Of Liens.

it occasions. The guest is liable for the whole bill & is in the nature of a pledge. the Inn Keep has his remedy in his own hands & may confine him without the intervention of process of law. 1 Show 269 2 Roll at 85. 3 Bac 186. But in this as in all other cases the lien is lost by a voluntary relinquishment of the property, for possession is absolutely necessary to its existence. for to suppose a lien without such possession is a legal solecism. St 557. 1 Bur 493-4. 1 Bl. 4. Co. Li. 584.

Thirdly. Mechanicks in general have a lien on the goods for the price of the labour which they have bestowed on them. 8 Co 147. Yel 67. 1 Bac 240. But there is not the same reason for the rule in the case of mechanicks as in the cases before mentioned as they are not obliged to recieve the property. It is however a rule of policy & a condition annexed to the bailment on behalf of trade & commerce that a mechanick is in the habit of trusting a particular employer he cannot assert this right against him without notice previously given. 1 Bac 240. An agisting person who is a bailee of the 3d Class has no lien for he is not bound to recieve ~~for he is not bound to recieve~~ nor does the interest of trade & commerce require that he should be invested with the right. 2 Str. 1145 Co. C 197. 1 Bac 240. The Capt of a Ship has no lien on the Ship itself for wages or stores tho. the mariners have the former trusts the personal credit of the owner with whom the latter have no personal communication nor ever know them as the case may be. Doug 97-101. 1 Ld Ra. 140 460-469 Ld R. 632. 576. 2 Mod 440. St 937. Where there is a special cont on which the bailee relies the law creates no lien. Thus a farrier contracted to cure a horse for a certain sum this cont held to oust him of his lien. The most satisfactory reason for this is that when there is an express cont on the subject between the parties the Law will not imply one. 2 Peak 92. Gill 66. 5 Bac 271. Co. Li. 585-6.

Fourthly, a factor or any commercial agent has a general lien on the goods in his hands for the balance of accounts. 3 T.R. 119. Com. Di. Tit Merc B. Amb 254. 1 Bur 494. 2 Blk Rep 1154. These are the principal Bailees who are entitled to a lien. But it must not be understood that no other bailees have a right to retain property against the bailors as the hirer agt the letter, the borrower against the lender who have a right to retain the thing bailed for the specified time or for the purpose of the bailment tho. it be gratuitous. before delivery, the bailee must in the last case retract but not so afterwards or the locus penitentiae is gone. This right is not a lien but a qualified property

Bailments. — Rights of Strangers.

Yel 172. 1 Roll Rep. 128. 1 Bac 240.

"The next subject of inquiry is of is of great practical importance & is this viz. how far the rights of strangers may be affected by the bailment. First. It is said that if one bails property not his own the bailee must return the property to the bailor & not to the true owner for he is not capable of judging between the parties. 1 Roll 606-7. 1 Bac 237-242. But I apprehend that this rule means nothing more than that the bailee will be justified in redelivering the goods to the bailor & that he may by that act discharge himself from the claims of the owner. The reason above designated cannot carry the rule to a greater extent & if it does it certainly is not Law. & it is laid down in 1 Roll 606-7 that if bailee returns the property to the bailor before or pending action it will discharge him. 1 Bac 242. Yelv 134. If the real owner does not exhibit sufficient evidence of ownership the bailee ought not on principle to be subjected the case being analogous to that of a finder. 2 Ld Ray 867. Es. Di. 599.

According to the test of Rose if the Bailee should die & his Exr come into possession of the goods he must deliver to the true owner at his peril for it is said that he having possession by Law is bound to restore them to the person who has by Law the right, but this is taking the other extreme and appears to be altogether arbitrary. 1 Salk 607. 1 Bac 237.

The next enquiry is when the creditors of the bailee or purchasers under him can hold the property against the bailor. It is enacted by stat 21 Jac. 1st that if a person who becomes a bankrupt is in possession & has the order & disposition of goods with the consent of the owners they are to be considered the property of the bankrupt & may be taken as such. This Stat extends to property that is bailed as well as that which is sold & the owner remains in possession & it can make no difference whether he ever was or not the owner of it. It is sufficient that he is ostensibly so. 1 Atk 166. 1 Ves. 82. Bogg 303. 2 Ves. 82. 7 Ves. 258. 2 Ves. 67. Cowp 432. Es. Ab. 569.

And indeed by force of the Stat of 13th Eliz & even by the Com Law the rights of creditors were the same that they are now as to goods originally belonging to the bankrupt of which he retains possession after sale. That Stat has therefore added nothing to the security of Creditors. The general rule of proof is the vendor continuing in possession is therefore fraudulent both by that & at Com Law or rather it is considered a badge or evidence of fraud which may possibly be rebutted. Cowp 233. 3 Co. 81. 2 Wm. 587-95. 7 Ves 71. But it is to be observed that it is not this fraud between the vendor & vendee between the bailor & bailee which authorises the creditor to come upon the goods but it is

Fullmarks of the rights of Strangers

the fals credit derived from them & the ostensible ownership which is in the latter 1 Ves 304-63-76-78 Cas. in Eq. 366. Hence if the bailor should succeed in rebutting the evidence of fraud it would be of no avail against the creditor for this is not the ground of recovery, which is the false credit derived from the acts of the bailee. 1 Atk 126-3 - 1 Ch 365a This Stat. of 21 Jac 1st is in affirmance of that great principle of the Com Law that where one of two innocent persons must suffer by the act of a third person he who occasioned the act or enabled the person to do it shall bear the loss, rather than the other. If it is in fact in affirmance of the Com Law it is of as much force now as in Eng & in spite of its provisions & the constructions thereon have been uniformly adopted in Conn.

It will be remarked that the law does not extend to goods held in the right of other persons as Executors guardians husband &c for their possession is given by the act of the law & not by the person beneficially interested 1 Atk 165 - 3 Ves 134 - 3 Ves 618 - but a mortgage of goods the mortgagor retaining possession is within the Stat. as such is absolute sales. Rob. fraud Cent. 316-57. 1 Atk 165 - 11 - 348 - 1 Mer 260 - Cas. in Ch. 366

Care must however be taken to discriminate the above from mortgages of lands as in such case there can be no fals credit possession is not evidence of ownership & reference is always had to the deeds to ascertain the title - hence the Stat does not extend to the sale of a Ship at Sea for it is impossible that there should be an immediate possession or delivery but possession must be taken as soon as the arrives. 1 Atk 165 - 1 Ves 396-461-6 - 2 Ves 462-85-96 - Cas. in Ch 367. There are other cases in which an actual manual delivery will be dispensed with & the sale will hold against both purchasers & creditors. A symbolical delivery will be sufficient as in case of the delivery of the key of a box where places the box under the power & control of the purchaser 7 Mod 11 - 1 Ves 99 - Cas. in Eq 377. The goods to bring a case within the Stat must be possessed by the bailee of his own & in other words he must have not only the possession but also the order & disposition of them or otherwise he does not appear to the world as the owner. Thus if a box of goods be placed in the garret or cellar of the bailee for safe keeping he cannot be said to derive any credit from them & therefore they are not liable to be taken for his debts. Case 253 - 1 Atk 185 - 2 Ves 316. Cas. in Ch. 367-70 - also a temporary possession for a particular necessary purpose does not come within the Stat. as in the case of delivering of goods to a factor or Com. merchant. 1 Atk 185 - 1 Selwin 197-200 - Cas. in Ch 367 - But this case the factor or Com.

Bailments. Of the Creditors & Purchasers

merchant cannot from the nature of their employ derive any credit from the goods. he does not appear to be the owner but is notoriously an agent disposing of the property of an employer 1 Bl. P. 802. 1 Str. 318. 3 P. 185. Co. L. C. 376.

Honest purchasers under the bailee who suppose the goods to belong to him will hold them against the bailor in like manner as the creditors 2 Bac. 602-3. When goods have been purchased & remain in the hands of the vendor with permission of the vendee a subsequent purchaser for a valuable consid. will by the Stat of 27th Eliz. have the preference In Com. Law would attain alike ends of both these Stat. & both are thrown received in Amer. Com. 4314. In most of this cases where the bailee has not the order & disposition of the goods or does not become a bankrupt the bailor can hold them against both creditors & purchasers under the bailee or any subsequent purchasers with the single exception of a sale in market overt. In support of the first branch of the rule we observe that there is no fair concert for there is no ostensible ownership Thus if A purchases goods of B and leave them in his store till a waggon arrives or a ship puts to sea it is not a case within the Stat. And in neither case is A deposited a bag of jewels with B who broke & pawned the jewels held not to bind the owner of his right for B had not the poss. of the property with the consent of the owner 2 Vez. 376. 4 Bl. C. 446. And when the possession is permanent the rule is the same but it has been sometimes ill established. But in the case of national currency there is an exception & a bona fide transfer as to the vendee will bind the property tho not made in market overt Salk 126. 3 Mod. 158. 1 Ld. Ray. 418. Co. Lit. 39. 379. Thus if a deposit coin or bank bills with B. for more safe keeping & for a short time & the bailee in breach of trust transfers it to one who is ignorant of the property & made receives can hold it. This is a rule of policy & required by the convenience of the commercial world. But in Com. Law & in Eng. a purchaser under a bailee can not hold the property against the bailor the owner when such bailee is solvent, because they may take their respective remedies against, him, viz. the Creditor may attach property in & the purchaser may sue on the implied warranty Insolvency is absolutely necessary to defend against the rights of the owner 3 Atk. 44. In this last authority it is also well settled that there must be such an agreement as to give the bailee the disposition of the property & the mere thing is not that consent of the owner which is requisite to bring the case within the Stat. This a passing such a disposition by a tort or breach of trust will not avail the bailor of his rights.

Sullivan v. ... Of the rights of creditors, purchasers &c
any more than theft or robbery. 1 St 185. 3 & 4 Ann. 1 Bac Ab 88-645-
Lane 306. 7 T.R. 67. 237. 1 Ves 243.

In illustration of the general principles which govern the rights of bailors
as regards creditors & purchasers we shall put a few more examples.
"Thus if one in travelling should break his carriage & should leave it with
a mechanick or should lame a horse & there (as trust) hire with another Kat
& if either of them should become bankrupt there is no pretence that
the creditors could take the property in Q. E. 4. & it may be laid down as a
general rule that when the possession is temporary for a reasonable &
necessary purpose (as in the cases above) the bailors may defend against
the creditors & purchasers. Bonny 63. 1 St 185. 7 Ves 567.
"There are also many cases of a mixed character but the rule is that the poss.
must be such as to induce a descreet man & not one who is peculiar
to rely on it in giving credit. Thus if Jones cattle to Sly by
B who sells them in the way the Court hold that the mere act of
driving the cattle was not sufficient evidence of ownership to warrant
a purchaser & therefore the maxim "Caveat emptor" applies.
Suppose goods are hired for hire as a yoke of oxen for three months & the
creditors of the bailee take this interest in execution. "The use of the oxen is
certainly of incumbrance value & would therefore at first sight seem to shelter
on the same footing as the property & this is sanctioned by a decision of La Ch.
Justice King but I am clearly of opinion that it cannot be taken for
the Court is as in all cases of bailments strictly fiduciary. We have
already seen that a pawn cannot either be assigned by the pawnee or
taken in Ex. by his creditors. So also in the case of hiring the bailee can
not transfer his qualified property on acct of the special confidence
reposed in him & "a fortiori" it cannot be taken in Ex. if the party
cannot assign it by his own voluntary act. And indeed if we
consider the remark of Ld King already as also in relation to the subject
matter of this decision it does not impugn the doctrine for which I
contend. 1 P.C. 11-12. 3 Ves 604. 1 Ch. R. 2 Bac 392. - Selk 446.
Ld Ray 195. 713-15-16.

Next I shall consider to what actions the bailee & bailor are
respectively entitled. It is a general rule that the Bailee as he has
the general property may maintain either trespass or trover against any person
who is guilty of a wrongful act towards the goods. But the rule is
by no means universal as I shall hereafter show. 5 Bac 164-260
Salph 284. 1 Roll 4. 2 Bulst 268. 2 Revis Hist. 392. Thus if A
deposits goods with B & C a stranger injures them or takes them

Bailments. of the actions to which the bailor & bailee are entitled

away. The bailor may recover in trespass or trover &c relying on the constructive possession which a right of property in personal chattels always carries with it. And this constructive possession is precisely as effectual as an actual one to support the above actions. 2 Roll 369

A right of poss. is a poss. or that which we call constructive unless some person had an actual one under colour & adverse title. Thus in the above case A has a constructive poss. & he can demand & recover the goods of B at his pleasure & it will be remembered that poss. either actual or constructive are necessary to sustain the action of trespass or trover. The above is a case of deposit. Suppose goods are bailed for hire & during the time a stranger wrongfully takes them away the question occurs can the bailor sustain an action against the wrong doer. See with following 1 Lev. 48 7 T.R. 9. 1 Ld. 480. 5 Co. 2d 383. 2 Lowes 432. 1 Bul. 68 Co. 2d 576. There is no doubt but that the bailee can maintain the action but how far the bailor can is yet to be determined. If the good be taken either from a depositary or mandatory the bailor has a right of action for the immediate injury & this rule holds in all cases when the bailee is countermandable for in such cases there is a plain constructive poss. 5 Bac 164. 262. Salk 214. 1 Roll 4. 3 Rees Hist 392. 2 Salk 290.

It is said that if the bailee gives the goods to a stranger the bailor cannot maintain trespass at all nor trover in the first instance a demand being necessary & the reasons assigned is that there is no tort or misfeasance in the act of such stranger. 5 Bac 167. 261. 1 Roll 607. 1 Bac 237. But according to a late case this doctrine would seem to be somewhat questionable for the gift is a breach of trust & it has been decided that if a factor pawn the goods of his principle the owner may sustain either trespass or trover against the pawnee 4 B & A. These decisions are irreconcilable & therefore the former would seem to be exploded. But at any rate it is evident that after a demand & refusal which amounts to a conversion & production of sufficient evidence of ownership trover is sustainable by the bailor 1 Bac 242. 1 Roll 607. Sa. R. 567. 1 Ros. 55.

It is a conceded point that most bailees at will think all may maintain trespass or trover for the full value of the goods against any wrong doer whatever 5 Bac 262. Sa. R. 246. B.N.P. 33. Kir 39. Salk 163. 1 Mod 31. The bailee is to all strangers considered as the absolute owner of the property & he always declares as such therefore between bailor & bailee the latter has only a qualified property. On the same principle the under may maintain the proper action against a stranger who either

takes away the goods found or injures them while in his poss.n as in the case of a boy who found a jewel; 1 Salk. 33. 1 Str. 505. Ca. 203 574-7 1 Bac 346. for the boy had a lawful poss.n & that was sufficient for his purpose. Can it then be said that the interest or title of a depositary or mandatary is less than that of a finder. But we are told that the ground of any bailees right to sue for the full value is responsibility over to the bailor & therefor it is concluded that as the depositary or mandatary is not thus liable over unless he be guilty of fraud he cannot sustain an action Co Litt 89 Selw. Abr. 238. 13 Co. Rep. 69 Jac 164 & 262.

To this I reply that the reason of the right of the bailee above assigned is untrue & secondly if it were the ground of regress the depositary would have the same right with any other bailee. for every one of them has a special property & therefor it can make no difference whether responsible over or not. A mere lawful poss.n is in all cases safe to support an action as it always confers a special qualified property. 7 T.R. 372-8 7 ib 396-7 & Ca. Lit. 577 7. 1 St 505. Ames 112. 1 Bac 240. 346. Sel. Ab 262 The language of La Raym is emphatical. The finder has such a property as to justify him in retaining against all persons but the rightful owner. A domestick or menial servt may sue the hundred in which he is robed and recover in his own name damages for the loss of goods which belonged to his master. hire the foundation of the recovery is not liability over 4 Mod 1164 Cowp Rep 629. Dumbers 263 12 Mod 514. So also a servt may have an appeal of robbery or felony for the loss of his masters goods which is a criminal prosecution & that too without any of that responsibility over which is argued by some to be necessary. 13. Co 69. 2 Saun 358. Yin 129-35 Likewise an uncertificated bankrupt who has obtained property may maintain an action against a wrong doer tho. it was upon acquisition vested in the assignees & therefor he has nothing to rely upon but bare possession 1 Bl R. 44.

It has also been determined that when a house was blown down the lessee could maintain an action against a stranger who took away the timber & not an act of property for that was in the reversioner & not because he was responsible over for that was evidently not the case but only on acct of his possession. From the above authorities & analogies it may be seen that it is unnecessary to resort to any authority over in order to give the bailee an action the true ground is that as to every wrong doer he is considered as the absolute owner of the property See the above case & vi. 33. Ca. Lit. 89 1. 15. 7 T.R. 327.

But taking it on the ground of liability over the depositary or mandatary is as much entitled to this action as any other bailee for there is a

Bailments. Of the actions to which the parties have a possibility of his being subjected & this is sufficient tho actual liability cannot be investigated in an action between bailee and stranger.

The policy of the law requires that every bailee should have this right of action against a wrong doer for the bailor & bailee frequently live at a great distance & if the latter were obliged to wait till he could get a power of attorney from the former justice would often be defeated. — If a bailee delivers goods to a stranger the latter may maintain an action for them & this is directly in the teeth of the rule above controverted for this stranger is a mere depositary since there has only been a transfer of possession 5 Bac 260. Bac 242. Roll 60.

It is an agreed point that an auctioneer or broker may maintain an action on a cont. for the sale of goods & recover the stipulated price & this too tho. the purchaser knows who the owner or principal is. This is in contravention of the rule that in case of a sale by a factor the master must bring the action but the cont. in such case is made in the name of the master but here in the name of the broker or auctioneer on which this distinction appears to be founded 1 H B 81. 2 ib 591. 1 Chit Read & Much more than may a factor bring an action in his name. — The same law in case of a ship captain on conts for freight). — These decisions are founded on principles of mercantile law a factor is an agent in a foreign country a broker an agent in ones own country & an auctioneer may be either the one or the other. 3 D. 130. 1 H B. 82. The bailor & bailee may in many cases have each of them an action. The bailor cannot obstruct one in all cases but the bailee may in all cases which may possibly arise. But tho the bailor & bailee have both this right of action in most cases subsisting at the same time, yet there never can be but one recovery for the full value. — If the bailor sues in either trespass or trover the bailee cannot have those actions against the wrong doer for in these the party always goes for the full value and in such cases there would be double damages for the same offence. but the bailee can have case tho not trespass or trover relying on the special damages which is a distinct ground of action. It is laid down in Roll that the one who first recovers ousts the other of his action but it should rather be that the one who first commences shall have the priority. 13 Co 69. 5 Jac 165-166. 2 Roll a. b. 569. 5 Jac 559. Latch 127. — If the bailor has received a satisfaction from the wrong doer he cannot recover an additional compensation of the bailee for the law allows of but one satisfaction & this rule may be laid down in even stronger terms. — If the bailor commences an action against such person he does ipso facto discharge the bailee for he either precludes the latter from indemnifying himself or at any rate suspends his remedy —

Bailments. The actions which the parties may have to which the cases of rescue & escape are analogous. The pff has his remedy against the rescuer & the party escaping & if he sue the former he must abide by his election. Ld R 1217. Co & 24 or 35 3 Lev 124 Salk 11 Yel 68. Co Lit 610-12-319. Hut 98. Cro C 77-109 There are several other analogies which show that when a person has his election of two remedies & you choose one he of course abandons the other. 3 Lev 119. Salk 248. 12 Mod Rep 6

On the other hand if the bailee sue the wrong doer for the full value of the goods he becomes at all events liable to the bailor & this will follow as a matter of course if by commencing the action he either delays or cuts the remedy of the other party. But tho the bailor has recovered the full value the bailee may nevertheless have an action to recover the special damage which he has sustained. A depositary or mandatary cannot from the nature of the bailment sustain such damages but a hirer may & frequently does. Thus if A. hire a horse for a journey & a wrong doer takes him away & he is delayed his business & action will lie in the first place in the name of the bailor to recover the full value of the horse & a second one may be brought by the bailee to recover the special damage which he has sustained by the delay. For it is an established rule that if one by an unlawful act causes an injury to another he shall pay an adequate compensation for such injury. 3 Ld 165. If the bailor himself take the property from the bailee the latter may maintain a special action on the case against the former for the special damage as the injury to the bailee is precisely the same as if done by a stranger. He cannot indeed have trespass or trover. So laid down by Ld Coke there being actions for the full value. 3 Bac 185 266. Co Lit 401. 13 Co 69. The reason why I suppose he cannot maintain either of the above actions is that his special property is the ground of his action & his special loss the measure of his damages. Between himself and a stranger he has to be sure a general property & may recover the full value or at any rate the court will not suffer a wrong doer to take any advantage of a want of such interest but as between bailee & bailor the former has a qualified property only consisting in the custody & use of the goods. According to which the bailee may sue the bailor in trespass or trover & the latter may give his general property in evidence in mitigation of damages. Just to this I answer that this is going on the supposition that this is going on the supposition that the party had originally a right to recover the full value. but this is not true. he had prima facie no such right & therefore the rule is unsatisfactory. 3 Ld 385. Co Lit. 57a. 1 T. 333 61. In addition to this I would observe that the full value is in no case the measure or rule of damages

the special loss may be much greater or it may be less. when there is the propriety of permitting a party to sue for the value of goods when such value is to have no influence on the amt of damages. If the bailee delivers the goods to another contrary to the orders of the owner it is an unlawful use or disposition of the property & ipso facto a conversion. & trover can be maintained without a demand. 4 Bac. 260 Co. Dig. 581. Generally a bailor can maintain no action against the bailee but detinue or a special action on the case the former has now gone out of use & the latter is usually brought. as 1st case for negligence or nonfeasance. or 2nd trover for tort or misfeasance, or 3rd assumpsit on the cont. express or implied. 1 Bac 237-8. 5 Co. 72. Cro J 246. Co E. 78. When loss accrues from mere negligence he may sue in the case for tort) or in assump. on the agreemt but not trover to support which misfeasance is always necessary. 3 Est. 62. 1 Mo 282. 7 S 319. But in general trespass cannot be maintained at all by bailor against bailee since the latter has a lawful possession of the goods. There is however an exception in the case in which the goods are destroyed which puts an end to the cont. of bailment) & the bailee is presumed to have received the property with a view to the destruction of it. & is therefore made liable in that form of action 8 Co 146. Peak Ev 191. 5 Ct 13. 1 Inst. 57. 2 Roll 555. 2 T R 465. 3 Bac 266

Inns & Inn-Keepers

This subject is closely connected with that of bailments in the course of which most of the principles relating to Inns & Innkeepers have been noticed. At Com Law any person may exercise the employ of Innkeeper unless the number of Inns becomes so great as to be inconvenient to the publick for by Com Law Inns unestablished without licence tho the Stat. 2. of the U. S. of Con & I believe of most of the rest of the States render a licence necessary. 3 Bac. 178. 9. 1 Roll 84. But inns may from their numbers become inconvenient to the publick & even common nuisances, and the keeper may be indicted at Com L. as for com. nuisances. You will readily perceive that this cannot be the case when the taverns are licenced by Stat. 4 Jac 168. Cro. Car. 549.
So also the keeper of a disorderly tavern may be indicted for a publick nuisance independent of any reference to numbers. and such sup. 1 Hawk 198. 225

The duties of Innkeepers extend in general only to the entertainment of travellers & keeping their animals they travel with & also their goods. 3 Bac 180. 1 Co 87.

Inns & Innkeepers

And if an infant Innkr refuse without sufficient cause to keep & entertain a traveller without good & sufficient reason or reasonable price tenderd he is liable not only to an action on the case in behalf of the person injured but he is also liable to an indictment it being disorderly behaviour thus to frustrate the end of their institution. 1 Bl. 168 1 Hawk. 225. 3 Bac. 181. If an Innk. by himself or servt. deals out unhealthful food or liquor he is liable to an actn on the case. 1 Roll 95 3 Bac 182.

This Innkr is a bailee of the goods of his guest and his liability for them as such is not discharged by absence sickness or insanity. This strictness is founded in policy to guard guests from frauds. for his absence might be on purpose to defraud, or his sickness or insanity might be affected, at any rate he is bound to provide for such contingences. Besides the opportunities he has to defraud and pilfer make strictness in these rules indispensable. (Bro. C. 622 3 Bac 182.

An infant innkr is not chargable like other inkeepers i.e. as bailee, for he cannot make the cont. express or implied on which all bailments are founded. He may however be subjected for fraud or violence or any positive torts but not for omissions or mere negligence. because the law will not allow his privilege to be infringed on the ground of publick policy. 1 Roll 2. 1 Bac 82. If the Innkr has not room or conveniences to accommodate & the traveller persists in his determination to stay & take his chance "as the saying is" the Innkr will not be liable except for positive torts. Dyer 158. 3 Bac 183.

It has been made a question whether when a host requests his guest to lock his apartment & his non compliance is the occasion of loss, the host is liable for them. The opinions appear to be divided 3 Bac 183 Dyer 266. Mor 78. 158. For myself I should think he ought not to be liable the request is certainly very reasonable and ought to be complied with. There may be many in the tavern unknown to both & if he does not lock the door host ought not to be liable unless it be proved that he was privy to the taking or injury. Merely delivering the key to a guest does not however discharge the host it is merely giving the guest an opportunity of securing his goods it being supposed that there is no intimation of danger given. but it is too much to say that an Innkr ought to keep a guard over every apartment after he has requested the guest to lock his door. And an Innkr is liable as such altho ignorant of what the effects of his guest may consist. tho. if he were deceived as to their value by misrepresentation. I should suppose he would not be liable as in the case of a Com Car. As a general rule Innkrs are liable as such only to travellers & such as

as such as stay at his house in the character of guest & at the rate usually charged to travelers. He is not liable to his neighbors for the they should lodge in his house as no more one should room his hat or cane there. Nor is he liable to boarders properly so called who live with him at the same price charged at private. For there is no reason why boarders therein have a higher claim against him than against any other man in whose family they may board. The host in this case is not in the character of Innk^r and cannot & cannot be liable as such 1 Co. 96. 1 Roll 3 Skinner 276. Bac. 183. Besides the policy of the law does not extend to him for one who lives in the house as the a boarder may judge for himself of the character of the inn^r.

An Innk^r is not chargable in the absence of the owner for any goods for the keeping of which he receives no reward. By the owners absence keeping such an one as diverts him of the character of a guest, for the Innk^r is liable as such only in the relation of Innk^r and guest. 1 Roll 3. 3 Bac Abr 185. Salk 388 2 Ld. Ray 270. Ray 146 Lofft 172. 3 Bac 183. But for goods for keeping of which he receives a benefit he is liable tho the owner has left the Inn & is not a guest as to himself personally for as to the goods the relation still continues. As if a traveller should leave a horse which it is profitable for the host to keep. Co. L. 185. Salk 388. 1 Roll 3. Ray 126. Mod 874. And also when the goods of a guest are in the poss^n of his servt & taken by him to an Inn. the Innk^r is chargable to the owner or master precisely as if he were himself the guest. Co. L. 224. Yel. 162 Ld. Ray 158. 5 T.R. 273.

As to the remedies an Innk^r has against his guest, I have already stated the rules in part to you. An Innkeeper may detain the person of his guest until the whole bill is paid & if the guest leave the Inn without paying his bill & without permission the Innk^r may pursue & retake him, and as I have no doubt he has the same remedy tho the guest flies into a neighboring State. For it has been determined in Con. & in N. Y. that bail may retake the principal with a bailpiece in a neighboring state. As to the Com Law rule see 2 Roll 83. 3 Bac 185-6. Salk 388. Lutk 156.

The Innk^r may detain the horse of his guest for the expenses of keeping the horse but not for any other part of the guests bill. This is according to the generale rule in relation to lien on personal chattels. Bac bailment. But though he may detain the horse, he can neither use nor sell him for he is in the custody of the law & the very act would make him a trespasser from the beginning & liable as such. Dyer 185. Sid 356. Mon 3/7.

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General Rules

I. The credibility & weight of evidence is in general to be determined by the jury. Its admissibility being matter of law might be settled by the Court. 2 H. Blk 205. Doug. 368. Ped. Co. 2-3.

When however the record is put directly in issue by the plea of nul tiel record, the weight & effect of it and to be determined by the Judge. In this case the issue is closed to the Court not to the jury. Pea Co 2-3. 3. Blk 330-1. 6 Co 53. Co Litt 117-260. Law 146-8. 226

For a record is of too high a nature to be tried by a jury in any other way than by itself. 3 Blk 331. Co Litt 117. 260.

But when a record is introduced incidentally on an issue to the jury it is to be read as evidence to them, the in its effect it is conclusive as to the facts which it imports to find or establish Pea Co 2-3.

Neither party is bound to prove those facts which are not denied. - For such part of the pleadings as are not denied by the opposite party are of course admitted to be true. Pea Co. 4-5. 11 Bac. 2-73. Bul. 298. Co 153.

II. The admission on the record by one party of any allegation on the other side precludes the former from denying the trial the fact so admitted Pea Co 4-5. 4 Bac 2. 2 Mod 5. 3 Ev P 239. Law 18. 1. Ph. Ev. 141

The burden of proof lies regularly upon & regularly upon that party who takes the affirmative of the issue. For in general a negative does not in the nature of the thing admit of direct proof. Pea Co 5 Bul 297. 5. 2 Roll Rep. 461. 1 Phil. Ev. 150

But there is an except to this rule when one is prosecuted for not doing an act which by law he is not bound to do. For in such case to presume the negative would be to presume guilt. And the except holds in civil as well as criminal cases. Pea Co 5-6. Gilb Law 98. 148. Bac Abr 298. - 1. Ph. Ev. 151

O Bart 192. Comm. 97. Does it hold however among the alleged omission of duty into a crim. neglect. 3 East 192-200-1.

And if issue is taken on the life or death of a person on whom rests the burden of proof is on the party asserting the death. 2 Cont 312. 2 Fon Eq 161 And the rule would be the same I trust that the party proved each the fact in the negative. as by averring that J. B. was not living. For the legal presumption is that a person not proved to be dead by direct or presumptive evidence is living at the contrary appears. Pea Co. 313. 1 Stark Ev. 661

III. Irrelevant. No other evidence can be admitted than such as is pertinent to the issue. or matter of fact in dispute. Other evidence than this is called irrelevant. Cak. 6. 2 H. Blk 205. - 1 Ph. Ev. 126.

Hence the character of either party cannot be called in question in

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a civil suit unless it be put in issue by the proceeding itself, i.e. unless it conduces to prove or disprove some matter of fact involved in the issue — Peak 6. Swift Ev 140. 12 Ad. Ev. 139.

Nor is the Deft allowed to support his character in such cases by proving the contrary. Pea. Ev. 6. Bull N.P. 296. Swift Ev 140. For the evidence is considered as not conducing in any good degree to prove the matter in issue.

IV. But in an act for Crim. Con. the Deft may in mitigation of damages not only impeach the general conduct of the Pltff's wife, but may prove particular acts of adultery with others. For the Pltff by charging the Deft with seducing her puts her character for chastity and good behaviour in issue. Peak 7. Bul 296. 10th Ca. 562. Swift Ev 140. 1 Selw. N.P. 32-1. 4 T.R. 657. Gilb 113. — 12 Ad. Ev. 139.

But the Deft is not allowed to prove instances of her misconduct subsequent to her adultery with him for such misconduct might have been occasioned by his own wrong. Peak 7. 8th Ca 561-2. Swift Ev 140. 1 Selw 31.

In an act for breach of promise of marriage also the Deft is allowed to impeach the gen. character of the Pltff for chastity & to prove instances of licentious conduct. (Query may he not impeach her general character in any & every respect) Selw 31 n. 1 John Ca 116. 3 Mass R. 189. 3 Esp Ca. 236. For the act puts the character & conduct in issue.

But it has been holden that where deft seduced the Pltff's evidence of her general character cannot be admitted in reference to the time between the making of the promise and the breach of it. 3 Mass R. 189. This seems to be a correct distinction. see Cont. John. Ca. 116.

V. So also in an act by parent or master for seducing a daughter or female servants by good scrutiny amount. The Deft may in mitigation of damages impeach the gen. character of the servt or daughter for chastity, or prove her conduct to have been licentious 1 Root 472. (Query can he show her character was bad after seduction?) For the loss of service tho nominally the gist of the action is neither the rule nor the principal ground of damages. The real ground of damages is the wounded feelings of the parent & the disgrace occasioned to his family. 3 Wils 19. 1 Esp Ca 645. Law 67 &c. 2 East 23-5. 2 Selw N.P. 1087. 2 Bul. 65. See Parent & Child 11.

In criminal cases also when the Defts character is put in issue by the prosecution the Prosecutor may attack his character by proving particular facts otherwise it would be impossible to prove the charge. Peak 7. Bul 296. 1 Mc Nally 224. E.G. In an indictment for keeping a house of ill fame & for being a common scold &c. Query can he enquire in such cases into the Pltff's gen. character unless the Deft has given evidence in support of it. 1 Mc Nally 224. Bul 296.

VII. But there is one case of the sort where the Pros[r] is not allowed to examine as to particular facts without giving previous notice of them viz. where one is indicted for being a Com. Barrator. Peak 7. Bul 296. 1 Mc N. 324.

But in other Crim. Cases i.e. cases in which character is not put in issue the Prosecutor cannot examine into the character of the Dft. unless the latter has exhibited evidence in support of it. ante 7-8. Bul 296. 1 Mc N. 324. for the evidence would be irrelevant.

And even if the Dft has thus opened the inquiry the Pros[r] cannot examine as to particular facts but only as to the gen[l] character. For the Dft cannot be supposed prepared to disprove particular charges not put in issue without notice and when his character is not put in issue then is in judg. of law irreputed. Bul 296. 1 Mc N. 324. Peak 7-8. Swift 161 & 162.

VIII. And in Crim. prosecutions in which the Dft gen[l] character is not put in issue he is indulged in proving that it is good. 1 Mc. N. 320-2 Peak 8. Swt Ev 141. This rule is founded in the benignity of the Law towards persons accused of crimes. This indulgence was formerly allowed only in favorem vitæ i.e. in capital cases. but it is now extended to cases not capital as misdemeanors &c. 1 Mc N. 320-1. But Ev 146-2. 1 Pa. Ev. 141.

It is not allowed however in acts or informations for mere penalties. these being regarded then not being regarded as purely criminal proceedings & as direct prosecutions for crime. 1 Ld. 532. Peak 8. Peak says indeed that the rule extends to no other than prosecutions for offences which incur corporal punishment (Peak 8.) but Law for his authority does not seem to support (2 Ld. 532.) so general a proposition & there are opinions directly opposed to it. 1 Mc N. 320-2.

VIII. Evidence in support of the Dft's character in criminal prosecutions may be particular as well as gen[l] i.e. the witness may not only testify in favor of the Dft's character generally but may assign particular reasons for his opinion. 1 Mc Nally 322-4. Swt Ev 141.

But evidence against his gen[l] character must be gen[l] only, for the reasons above given. Bul 296. (2-7)

In cases in which the evidence of guilt is weak or merely presumptive, proof in support of the Dft's gen[l] character is very important. Peak 8.

In all cases the best evidence which the nature of the case admits must regularly be produced, withstanding this a proving that which is of an inferior or secondary sort affords reason to conclude that the former would operate against the party producing the latter. Peak 8-9. 102. Swt Ev 157. 1 Mc N. 342. 12 Phillips Ev. 167

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Thus if a party wishes to prove the contents of a written instrument in existence & in his custody the instrument itself must be produced. The contents of it cannot be proved by parol evidence nor by copy. 1 Pl. Ev. 107 Leak g. 10 Co 92. Swt Co 28. 1 Mc N. 336-7. 60. 2 i.b. 468. 20 or in case lost or in possession of adverse party see porter.

IX. So also if a deed is attested by a subscribing witness the execution of it can regularly be proved by no other evidence than his. Leak g. Swt Co 25-6. Doug 205 or 16. 161. Pa 89. Hart 53. 2 i.b. 183. 1 Pl. Ev 356-7 Esp Di 257-8. Leach C.L. 284. For exceptn to this rule see post.

But the law does not require that all the evidence which might be obtained should be produced. Hence the evidence of one of two or more subscribing witnesses to a Deed is sufficient to prove its execution, Leak g. Swt Co 27-8. - 1 Pl. Ev. 169-

In gnl no precise number of witnesses is necessary at C.L. to establish a fact. Such evce as satisfies the minds of the triers is sufft. Of course one credible witness is all that the law requires 1 Garth 104 1 Show 198. Swt Co 142. 1 Mc N. 16. - 1 Pl. Ev. 167-

On a prosecution for perjury however two witnesses are necessary to a conviction. For if there is but one there would be but oath against oath. Leak g. 4 Blk 358. 10 Mod. 194. 1 Mc N. 37. See 1 Mc N 31. 2 Hawk P.C. 25. 129 whether it was so required by comn law, sed vide 1 Pl. Ev. 107.

In treason also & petit treason & misprision of treason two witnesses are required by several Eng. Statts the first of which is that of 7 Edward 6th. Leak g. 10. 4 Blk 356-7. 1 Mc N.J. 15-21. - 1 Pl. Ev. 108

X. But this was not the rule of the Comn Law 2 Hawk P.C. 25. Leak g. 3 Inst. 26. 1 Mc N. 16. Contra 3 Inst. 26. Ray 408.

And in treason by Statt Wm 3d both witnesses must testify to the same overt act or one of them must testify to one overt act & the other to another. 4 Blk 357. 1 Mc N 21-34. otherwise the Pris cannot be convicted except upon confession in open court 1 Pl. Ev. 109-

But by the Constitution of the U.S. both witnesses must testify to the same overt act, unless the Pris confesses in open Ct. See art. 3 Sec. 3.

The rule requiring two witnesses in cases of treason extends only to overt acts of treason. Collateral facts i.e. facts not constituting nor tending to prove the overt act may be established by one witness. e.g. that the Pris is a natural born subject. 1 Mc N. 34-35. 268. Ter 240. 5 St. Tr. 634. 1 Pl. Ev. 109-10.-

In perjury also the taking the oath under which the crime is alledged to have been committed (& the fact says Mc Sally. Then what fact.) may be established by one witness. 1 Mc N. 374. ~~1 Ph. Ev. 167~~

XII. It is a rule in Chancy also founded on the principle which governs in the case of perjury. that if the Defts answer is contradicted by one witness only the Pltf cannot have a decree. for the answer being under oath then is only one oath against another. 1 Ves 161. Dow Mast. 154. 1 Bez 66. 5 Pr Chan. 19. 1 Pow. C. 216. Bul 286. Esp. Di. 709. 7 Ves. 667. 1 Ph. Ev. 110

But in our practice the answer is not under oath the rule therefore Stuart does not obtain here.. Ch.

And by the Stat. of Conn. no person can be convicted of any capt crime but upon the testimony of two or three witnesses, or that which is equivalent. see Stat. Conn. 685. Swt Co. 162.

In the construct of this Stat it is not necessary that two witnesses should testify to the same fact or facts. one may testify to one part of the transaction & another to another part or the testimony of one may be direct & that of the other circumstantial, in either of which cases if their testimony be consistent & satisfactory & the witnesses credible the jury may convict. Swt Co 142.

XIII. In gen hearsay evidence (i.e. testimony by one of what he has heard a stranger say) is inadmissable. For 1st the witness does not testify to the fact in question but to the declaration of another respecting it. & that declaration is not in Court by one sworn in the cause. 2d Then can be no cross examination as to the fact in question. Peak 16-11. Gilb 107. Swt Co 121. Esp. Di. 284. Bul 294. 2 Last. 54. 27. Gilb Ev 127 1 Mod. 263. 3 T.R. 725. - 12 L. Ev. 173.

The declarations of a stranger are regularly no evidence unless made in Court upon oath. Hence if either a Judge or Juror is acquainted with any of the facts in issue he is to be sworn & examined in Court. Peak 16 n. 1 Ld. R. 146. 2 Mod 99.

The gen rule as to hearsay evidence admits of exceptions where the fact is of its nature & in Com presumption incapable of direct proof. Peak 11. Swt Co 121-2. 13 in questions of custom prescription & pedigree. Esp. Di 288. Bul 293. 1 Mc N. 303. 12 L. Ev. 174 Thus on a question of custom or ~~prescription~~ which can be proved only by usage gen. reputation may be proved by hearsay evidence. e.g. a witness may state what he may have heard from dead persons respecting the reputation of the right but not what they have said relative to facts shewing the exercise of it. Peak. 13.. Swt Ev. 122. - 12 L. Ev. 182-3

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XIIII. Hence on a question respecting ancient limits the witness may testify what have been the reputed limits & what disd persons have said respecting them, but not what they have said respecting the former existence of a building or wall, in such a place as the latter would be evidence of a particular fact & not of gen reputation. Peak 13-14. Dut 122. 2 T.R. 33.

Evidence of reputation is upon the same principle admissable in questions respecting the right of way (Peak 12. Bul 295.) as are the declarations of desd Managers respecting them.

Upon the question whether a certain piece of land was parcel of an estate, the declarations of a deceased tenant have been admitted in evidence. Peak 13. 2 T.R. 33.

Entries by a deceased Steward of money received in satisfaction of trespass done upon a waste have been deemed admissable to prove the right of soil. Peak 12. Del Dunn. — 12 Co. 172

XIIV. So entries by disd officers of a Township for Church rates of money rec'd of those of another Township for Church rates, have been admitted to prove the liability of the latter Township the entries having been made when no dispute existed by persons who made themselves Chargable with the money. Peak 12-13. 2 T.R. 669.

So the declarations of desd parishioners (when no dispute exists) as to the boundaries of their parishes.

But entries made by one claiming to be the owner of land of money paid him by a tenant are no evidence of his title even as between other parties. Peak 13. 3 T.R. 121.

Still however evidence of the declarations of the desd owner of land restraining the limits of those who derive title under him is always admitted 2 T.R. 123.

XV. On questions of pedigree likewise the declarations of persons who from their situations were most likely to know the fact may be given in evidence as facts of this kind can frequently be proved in no other way. E.G. Declarations of desd parents upon a question of legitimacy whether a child was born before or after their marriage. Peak 11-12. 182-3. Cowp. 591. 2 T.R. 719. Bul 294. Dow & Co. 182. Esp. Dig 484-5. 5 or 1. T.R. 94. — 12 Co. 174

But declarations of parents are not admitted to prove non access during wedlock. This is forbidden by consideration of morality decency & policy. Parents cannot thus bastardize their issue born after marriage. Peak 12-13. Cowp 591-2 Bul 112. Esp. Dig 485. Dow & Co. 123. P & C. 75. 12 Co. 180.

Declarations of mere Strangers are not admissable in questions of pedigree. 3 T. R. 723. 1 Mc. & S. 312. For they are not supposed to have the best means of knowledge. 12 Co. 175-6

But the gen[l] reputation of the family or place to wh he belongs is admissable when his pedigree is in question. Peak 11

XVII. To prove the state of a family as to marriages, births & deaths declarations of dece[d] persons likely to know the fact and the gen[l] belief of the family are good evidence. E.g. To prove whom J.A. married what Children he had, whether Jack a member of his family died abroad, what is the age of a child &c. Peak 12. Bul 294-5 Bl. Di 738-85. - 12 Co. 180-

In these cases also a recital in a deed, a special verdict showing the pedigree, the bill between other members of the family heralds books, entries in a family Bible & Statements in a Bill in Chan[y] are good evidence these being all in the nature of declarations out of Court. Peak 12. Bul 295. Bl. Di 738.

But hearsay is not evidence of the place of one birth for this is not a question of pedigree but a single point of locality to be proved like other ordinary facts. 8 East 539. 1 M. & S. 348. 2 Ld. 27-31-63. 3 T. R. 704. Swi. Ev. 123. Bl. Di 785-6. - 12 Co. 180

In some cases also not without these exceptions is to hearsay evidence a memorandum made at the time of the transaction in quest[n] by a dec[d] person in the ordinary course of his business is admitted with other circumstances as evidence. Peak 14. - 12 Co. 181-

XVII. E.g. Entry by a dec[d] draughtsman of her deliveries for his employer the course of business being proved to be for the draughtsman to make daily entries. Peak 14. Salk 283. 690. Bul 282. 12 Co. 195

So an entry in an attorneys book for drawing a surrender (he being dead) was admitted as evidence of a surrender it being corroborated by long Poss. Peak 13. Sc 1129. Salk 285-86. Sal 285.

But such memoranda are not evidence unless the person who made them is dead even tho he is abroad. Salk. Sal 286

An Entry made in a parties book by himself has been received in confirmation of the testimony of a witness who had sworn that he saw the article delivered & had seen the entry soon afterwards. Peak 15 Bl. 398. Bul 294. But entries in the parties book are never of themselves evidence tho they may be so in connexion with other concurring evidence. Peak 14

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XVIII. In Criminal cases the rule excluding hearsay evidence appears to be somewhat more strict than in civil but it may be admitted by way of inducement or for the purpose of illustrating that which is proper evidence as well in the former cases as in the latter 1 Mc N. 282 - 360 - 14 - 297 - 9 - 351 Bal 294.

But there is an important excep^n to the gen^l rule, in Prosecutions for murder or I presume for any species of homicide viz that the declarations of the dec^d made under the apprehension of death as to the commission of the offence are admissable evidence. For this situation is consid^d as creating a sanction equal to that of an oath. Peak 15-6 .. Leach C. Cas. 563-7 .. 2 Ld Raym 1199 .. 1 East P.C. 353-6 Swt Ev 124 .. 1 Mc N. 381 - 1 Pk. Ev. 200 -

But declarations thus made by a person legally infamous (as an attainted felon) are not admissable. For his testimony under oath could not in reason Peak 16 .. Leach 368 or 78 .. Swt Ev. 125 .. 1 Mc N. 387

The declarations of a person mortally wounded but not under apprehension of death are not admissable for the same reason as that apprehension is wanting. Swt Ev. 124 .. 1 Mc N. 383-5 Leach C. Cas. 364-9 - 563 - 1 Pk. Ev. 200.

XIX. It is not necessary however that the party making such declarations should express any apprehensions of approaching death in order to render them admissable. If it can be collected from the circumstances of the case that he was under such an apprehension they are evidence Swt Ev 124 .. 1 East P.C. 353. Leach C. Ca. 563 .. 1 Mc. N. 383-5

It seems then that the question whether such apprehension existed or not must be judged of by the Court for the purpose of deciding whether the declarations are admissable. Swt Ev 125 .. Leach C. Ca 563 1 Pk. Ev. 201 -

But the decision or opinion of the Court upon that question is not conclusive. It is still left as well as the credit due to the declarations to the jury. 1 Mc N. 383-6 .. Leach C. Ca. 364-9 - 563

And if they think that no such apprehension existed they are not to consider the declarations as evidence. i.b. exist.

The dying declarations of persons dec^d are sometimes admitted in civil cases. C.P. That a certain bill was received that another was forged by himself &c .. 1 Mc N. 386. 3 Burrow 1244 - 53 .. 6 East 88 .. Swt Ev 128 - 5 - 1 Pk. Ev. 211

What a dead person has sworn before on trial between the same parties may always be proved. For he was under oath and liable to cross examinations. 1 Mc N. 383 .. Swt Ev. 126. 5 St. 573 .. Fost 337 .. 2 Hawk 608 .. Norb 239.

XX. What one of the parties has said in relation to the matters in issue may always be proved by the other. a persons confessions being always good evidence against himself. Peak 16. 7 T.R. 663. Dut Ev 126.

But his confessions is to be proved not by itself as the case may be for if it is accompanied with any other declarations relating to the same thing the whole must be told but he is not entitled to the benefit of any qualifying declarations which he may have made at a different time Dut Ev. 126.

And a party is never allowed to introduce his own declarations as evidence for himself except when they constitute a part of the res gesta or matter of fact in issue as in the terms of a parol contract or where they accompany any act of his which is in question. E.g. in case of a tender, the declarations of the debtor as to the purposes for which the money was offered may be proved in his own favor Dut Ev 130. 1 East 138 1 Jons 89. Ex 312. 1 Mod 3. the rule is the same in criminal cases 1 Mc 573-7. 1 Hawk 133.

In one instance what a party has sworn in a former case may be proved in his own favor viz in an acc for mal: prosc for otherwise he would be exposed to great hardship Dut Ev 131. 6 Mod 226. Bul. 14. Ex 554-6.

But his confessions are evidence against himself whether he sues or is sued in his own right or as trustee for he is the party on the record Peak 16. 7 T.R. 663. Sutton 128

And what has been asserted by another against a party interested and in his presence & not contradicted by him is evidence against him for his silence as the case may be may be fairly construed into a tacit confession. Peak 16 Dut. Ev. 127-9.

XXII. But declarations of a stranger or even of a parties agent, wife, or child in his absence are regularly no evidence against him. Peak 16. 2 St 1094. 6 T.R. 681. Miles 577. Dut Ev 127-9. E.g. Miles acknowgt of having received wages earned by himself. 2 St 1094.

So in acc by husband & wife as Ex of her acknowledgements after marriage are inadmissable. 6 T.R. 688.

So in an acc for seducing Jeffs wife. Miles 577.

But where a wife in transactions usually regulated by wives makes a contract by the husbands authority either express or implied, her declarations are evidence against him H.P.M. 86. E.g. Her acknowledgement that she had agreed to pay a certain weekly sum for nursing her child Peak 17. St. 527. 1 Esp. 142. Dut 127. Ex & 1/2 7.

Evidence

The admissions or declarations of a servt or agent if made at the time of transacting the principal's business & relative to it are evidence against him. They are then part of the res gestae. Peak 18. 3 T.R. 488. Sm Ec 124. 2 Mc. 620-6. So esp if they relate to antecedent facts or such as are foreign to the business of the agent. Peak 18. 7 T.R. 6658. Sm Ec 12 ℔.

XXIII. The declaration of a bankrupt of his motives for absconding made at the time is evidence in an act by his assignees to prove the act of bankruptcy. It is a part of the res gestae 5 T.R. 512.

In an act by a husband on a policy on the life of his wife her declarations as to her ill state of health at the time the policy was effected are evidence against him. for sometimes in existence & frequently the nature of bodily complaints cannot be known by them or else by information from the person who is the subject of them. 6 East 188. Sm Ec 128-30.

Upon the same principle in prosecutions either civil or criminal for battery the declarations of the person injured of the bodily pain occasioned by the injury & made at the time of suffering it are always admitted in evidence. 1 Root 80. Sm Ec 130-1

When a party to a suit represents or stands in the place of another person the confessions of the latter are evidence against such party, e.g. Confessions of a testator are evidence against his Ex[or]; & ancestor against his heir when suing or sued as heir Swift Ec 12.

For as the confessions of the testator would have been evidence against himself if living they ought to be such against his representatives.

XXIII. In an act against a Sheriff for an escape the confessions of the escapee that he owed the Plff. are evidence Peak 65. 4 T.R. 431. For the confession would have been good evidence of his indebtedness against himself & by the escape the Sheriff becomes liable for the debt.

So in an act against a Sheriff for a false return an acknowledgment by orig[l] Def[t] is evidence. Peak 65.

And in the above case of escape if it were suffered by the Under Sheriff his confession of the fact of escape would be evidence against the Sheriff (Peak 178. Sm Ec. 128. 2 Ld R 1961.) The reason is that as to breaches of his official duty the Under Sheriff stands in his place & so far as respects civil liability may said to represent him.

So an act by the assignees of a bankrupt his acknowledgment (before the act of bankruptcy) of the petitioning creditors debt is good evidence

in support of the commission of bankruptcy 1 Esp 168. Pea R 65. for they represent the bankrupt.

Upon the same principle upon a scire fac. against a garnishee he may prove an acct of the absconding debtor that the garnishee owed him nothing. Bull Ni. 128.

So where a party to a suit claims or justifies by virtue of another's title the declarations of the latter as to title are evidence against him. As if A in trespass justifies under the title and by the order of B. Bu Ni 129.

XXIV. When there are several defts the confession of one will be evidence against himself only, not agt the others Bur 128-32. Keb 18 Mc. N. 60. 269. 1 Barnes 317. Bul 243.

Hence in acts against two joint & several obligors, promisors, &c. the confession of the other is not admissable to prove the execution of the instrument or the promise. Keb. 64-174-203.

But there is an exception to the rule (see the case of partners) If one of them is sued alone for a company debt the confession of the other is evidence against him (Peak 16. 6th ed. 269.) for the partnership being established each is agent for both.

And tho the confession of one of two joint and debtors not being partners is not evidence in an acn against the other to prove the contract yet the contract being established such confession may be proved to take the case out of the Statute of limitations. Long 629. Pea. Ca. 15.) For in this case the confession is not in the nature of such but as a fact or an act which in evidence has the effect of a new promise. the act of one being in such case the act of both.

XXV If one of two Defts suffers a default & the other pleads to issue the Declaration of the former may be proved on trial for the purpose of showing the amt of damages for the verdict ascertains the damages against both so that as to that point both are on trial. 1 Day 33. Bu Ni 128.

In criminal cases also the confession of the Deft out of Court or before a magistrate are evidence against him. Keb 18. 2 Hawk 604-7. 1 Mc N. 42-361. Lea 287-319. Peak 19. 2 Bur 895.

And it seems now settled that proof of his confessions corroborated by other evidence may warrant the jury in finding him guilty tho it was formerly held not sufficient. 1 Mc. N. 51-243. Bu 243. Lea. 319. Bu 131.

But a confession extorted by torture or threats or promise of pardon is not admissable Peak 19-20. Sw. E. 131-2. 1 Mc. 42 4. 2 Hal 280 2 Hawk 204-11. Leach 122. 248. Kel 18 am.

XXVI. And hence a confession made in expectation of being admitted a witness for the publick is not evidence Lew 636. Sw 132.

But a discovery of material facts resulting from a confession thus made is good evidence. e.g. A thief confesses the theft & informs where the goods are concealed & they are found at the place mention'd. Here the confess^n are not evidence but the information as to the place of conceal^t and the fact of finding are. Peak 20. Leach 299-301. 1 Mc. 47-8. Sw. Ev. 132.

In Eng. the examination of a pris^r before a magistrate & taken in writing is evidence agt him in cases of felony under the Stat. 1 & 2 of Ph. & Ma. 2 Hawk 604-5. 1 Mc. 67 Eg. 234-312.

There is no such Stat. in Conn.

A distinction is taken between confessions of a party & offers of compromise. The latter are not evidence in any case for a man must be permitted to buy his peace, & besides they prove nothing. Peak 15. 1 Esp. 143. Sw. 126. Ch. B. 208.

XXVII. But confessions of facts during a treaty of compromise are evidence against the party making them. Peak 19. 1 Esp. 143. 2 i.b. 475 3 i.b. 113. But 236. Peak. Ca. 5

The acts of the party amt in some cases to an admission which is conclusive upon him. Thus if one acts as an Innkeep^r & is sued or prosecuted as such he cannot deny that he was lawfully an Innk^r Peak 20. 3 T.R. 635-7. Sw. 129.

For as he holds himself up in that character to avail himself of the benefit of it he cannot avoid its duties otherwise Individuals or the parties might be defrauded

So if a man lives with a woman as his wife when she is not — she may bind him by contracts as a lawful wife might to. Peak 20. 2 Esp 637. Sw. 66 129 (Husb & wife).

XXVIII. And in some cases if one person treats another as holding a particular situation & thus derives a benefit to himself he is not permitted afterwards to dispute the fact. e.g. A rented Glebe land of B the Incumbent. In an act^n for use & occupation A was not allowed to dispute B's title, by proof of Simony Peak 21. 5 T.R. 4. 5 T.R. 732. 1 i.b. 761. n. 2 N. Rep. 260.

Evidence

Presumption is an inference from facts proved or admitted of the existence of some other fact or facts (Bull N.P. 136) e.g. if Stolen goods are found in the possession of one not own it is presumptive evidence that he is the thief. Proving threats of injuries &c presumption of guilt 1 Mfs Ch. 6. But all such presumptions may be rebutted. Peake Ev 21.

XXIX. Long & undisputed poss^n of any right or property affords a presumption that it had a legal foundation & in such cases even records may be presumed. The fact to be proved is submitted under the direction of the Court to the Jury. Peake 21-2 2 Selwin 1091. 12 Co 5. Comyn 105-216. 1 T.R. 399. Bac. Ab. 138. Esh. Di. 636-66. 3 Mfs. T.R. 399. Bush v Bradley & Haven sup ct 7.

This rule is founded on the principle of quieting poss^ns of long standing. (Comyn 215. Peake 22.) e.g. Grant of post office duties is presumed from long use. Comyn 102. - Com. Recov. from long poss^n (3 T.R. 139. 1 Burr. 1065). - Actual ouster between tenants in common from the sole & undisputed & undisturbed poss^n of one for thirty six years without accounting &c. Comyn 17.

XXX. So deeds of bond rate bills advertisements &c have been presumed after long & quiet poss^n Bush &c ut sup. 3 Mass T.R. 399.

And (semble) that an undisturbed poss^n or enjoyment for twenty years in Eng or fifteen in Conn^t may in analogy to the Stat of Limitations be left to the Jury as a ground of presumption.

So holden (obiter) in a Case for obstructing lights. Esp 636.

In case of a bond which has been due 18 or 20 years without suit or interest paid payment will be presumed unless obligee can assign a good reason for the delay. Peake 24. Bac Ab 138. 1 Bl. R. 532 3 P. Wms 395-7. 8 Mod 278. 3 Bro P.C. 555. Burrow 434. 1963. 1 T.R. 270.

Secus if he can account for the delay as by smallness of the demand or perhaps absence disability &c. Peake 24. Comyn 214. or if he can prove a recognition of the debt within the time as by payment of interest &c (Peake 24. 2 St 826. 2 Ld. R. 1317.) the presumption does not arise.

And an endorsement by the creditor if made before the time when such presumption might have arisen is good evidence of such payments Peake 24n. 2 St 826. 2 Ld R 1370. 3 Bro P.C. 555. Secus if made after that time Peake 25n St 827.

Ok a creditor entitled to a debt payable by instalments gives a receipt for one instalment it furnishes a strong presumption that the preceding instalments have been paid. So also of rent. Peak 24 3 BC 371. Cowp 103. T.R. 399. But this presumption may be rebutted. ib. ibid.

But mere length of time short of that prescribed by the Statute of Limitations in cases to which the Statute extends is not a sufficient ground for presuming the extinguishment of a right. Cowp 214. Peak 24 n.

Evidence

Evidence is divided into two kinds written and nonwritten.

Written evidence is divided into three kinds.

I Records. II Publick writings or documents which are not records. III Private writings. Peak 26.

1st A record is a written memorial of the law of the State or of the precedents of justice according to the laws & customs of the State. Hence written memorials of the acts of the Legislature & records of the Courts of Justice are Records. Gilb Ca 47. D. & R. 235-21. Peak 52. Gilb 7.

A record can not be contradicted for it imports absolute and uncontroulable verity, i.e. a real legitimate record. For in Law no evidence is consid^d so high as a record, therefore none can be admitted to contradict me. D. & R. 221. Peak 27.

If a record is made erroneous by means of any unauthorized alteration that fact may be proved by parol for then it is not a record but a mere forgery.

But no evidence is admissable to prove that an alteration which is made by the proper authority is erroneous. for any Court has power to controul & correct its own records. 1 Salk 366. 4 Burr. 2267. 1 St. 210.

And doubtless evidence may be admitted to show that a writing purporting to be a record is wholly a forgery and no record for this is not falsifying a record but denying the writing to be one which is a matter of fact to be proved like any other.

Fictitious dates of writs issued in vacation may be contradicted when necessary for the advancement of justice, and the real time of issuing the writ may be proved.

For the thing to be contradicted is a mere fiction of Law and is known to be such. And it is a general rule that all fictions of Law may be contradicted when justice requires as in case of tender &c. 2 Burr 900. D. & R. 124. Peak 27.

As records are memorials of the law to which all persons have an equal right of access they cannot be removed from place to place for private purposes therefore they are provable by copy which is the best secondary evidence. Gilb 8. D. & R. 225-6.

Evidence

And on this subject it is a general rule that when any writing of a publick nature which would of itself be evidence if produced, an authenticated copy is also evidence 3 Salk 154. Doug 572 1 Mod R. 353. Peak 91.

But on the other hand a copy of a copy is no evidence whatever for the first copy not being produced in court is never authenticated: In this case the attestation of the last only proves that it is a copy of the first copy but proves nothing of the original. Ld 154. 1 Mod 356. 3 Salk 154.

The publick acts of the Legislature require no proof of any kind for being the Law of the Land they are supposed to be known by all persons and the Judges are bound to know them. The Statute Book is read to refresh the minds of the Judges and not as containing any evidence of the Law. Gilb 10. 1 Bac. A. 222-5. Peak 26-7 note.

But private Statutes not being the Law of the Land are not supposed to be known to the publick or even to the Judges. Hence they are required to be proved as facts like other records. Gilb 12-13. Dyer 259. 1 Mod 126. 3 Bac. A. 222.

And that a private stat should be printed in the stat. Book. it can not be read in evidence for this is no more than a private unauthenticated copy not verified by oath or any official sanction. 3 Bac. A. 225 Peak 27. (Contra Ld R. 472 not Law.)

But if the Legislature declares that a stat in its nature private shall be deemed publick then it will be sufficient evidence or rather no evidence is necessary for the Judges are bound to take notice of it as of a publick Statute Peak 27 note.

Copies of the record of the Legislature are to be certified by the Secretary of State.

Records of Courts of Justice are to be certified by the proper officers. According to our practice by the Clerk where the Court has a Clerk otherwise by the Judge himself. In both cases the copies are to be authenticated by the seal of the Court whenever the Court has a Seal.

And Courts are presumed to know the Seals of all the other courts and all the Legislatures of the several states

Borden v.

in the United States Sow in 7. 7 Stat At. L. 153. Gilb 19.
1 Sid. 146-7. Peak 30-1

Copies of records under seal are called exemplifications. And it is a rule of Com Law that seals of publick Court are full evidence in and of themselves without oath or other authentication. 10 Mod 125-6. Gilb 19 Plowd 411 a. Stand 118-9. 1 Sid 146.

But it is enacted by Stat of U.S. that all exemplifications of office books which are kept in any publick office in any State, not appertaining to a Court, shall be proved or admitted in any Court or office in any other State by the attestation of the keeper of the said records or books, and the seal of his office if there be one, together with the certificat of the presiding Justice of the Court of the County or District in which such office is kept, or of the Governor, Secretary of State, Chancellor, or keeper of the great Seal of the State, that such attestation is in due form and by the proper officer and if said certificate is given by the presiding justice it shall be further authenticated by the Clerk or Prothonotary of such Court who shall certify under hand & seal of his office that such presiding Justice is duly commissioned and qualified, but if given by either of the aforesaid officers it shall be under the great Seal of the State. 7 Stat U. S. 153.

Copies of the Records of Courts of Justice are of four Kinds
I. Copies under the great Seal. These are not known in this county,
II. Copies under the Seal of the Court to which such record belongs.
These are in this country, what the former are in England
III. Office copies i.e. copies certified by an officer appointed for that purpose but not under seal.
IV. Sworn Copies, i.e. Copies compared with the original by a witness and sworn to by him in Court. Gilb 21-2. Peak 28-9 Bac. L 226.

I Copies under the great seal are deemed not copies but records themselves & there in Eng are the only evidence of a record on a plea of nul tiel record in a Court equal or inferior to that whose record is in question. But a superior Court may indeed order up the record itself by writ of certiorari. Plowd 411. Gilb 14 Hard. 118. Peak 28-9.

II Exemplifications under the great seal being unknown here those attested under the seal of the court are the highest evidence known in our Law & this is regularly the only evidence admissable on a plea of nul tiel record. The rule applies when the existence of the record is in issue in another Court than that of which it is claimed to be a record. Swt Ev 2. Buller 226. Peake 29-30 If the record is in Question in the Ct to which it belongs the original itself is to be inspected by the Judges & hence in this case, the replication prays an inspection of the record. Peake 29.

The issue of nul tiel record always concludes to the court and never to the Jury. See Laws on Pleading in Appx

But when a record is only matter of inducement & not the gist of the acc nul tiel record cannot be plead D.N.P. 230. Gilb 26. 1 Sid 145-6. Laws 46.

In these cases since issue is tried by the Jury a sworn copy is admissable Dal 230. 2 East 473 For the existence of the record as well as the issue is in this case tried by the Jury & not by the Court. But the copy of a sworn copy is no more admissable in this than in any other case however it may be authenticated Peake 29.

III Office copies are grantable only by an officer appointed for that purpose & when so granted they require no collateral proof to support them but are in themselves full evidence in all cases where they are any evidence at all. Gilb 23. Plowd 210. B.N.P. 229. Peake 31-3.

But a copy certified by an officer not entrusted by the law to make such certificates is no evidence at all i.e. it derives no authority from the certificate of such officer. Gilb 25 24-6. B.N.P. 229.

IV But altho a record is in general provable only by a copy of some kind yet if it can be proved that such a record does existed & is lost with out the fault of the party, then inferior evidence may be admitted to show its contents Gilb 22. 1 Vent 257. 1 Mod 117. Salk 285. B.N.P. 288.

And in such cases a copy if there be one tho not exemplified or sworn to is admissable provided probable evidence can be shown that it is substantially a copy. "This is allowed from the necessity of the case." Fuct. Supp.

"This rule however applies in general only to ancient records for if a recent record is lost & the contents

are so far in the recollection of any person on y the Court that they may be proved the Ct. will order the record made again de novo. 2 Burrow 722. 1 Mod 117. Gilb 22-3. Peak 50.

Generally an exemplification or copy in order to be admissable must be of the whole record & not a mere extract for a detached part may give a very different impression from that of the whole. The rule is the same as to other instruments as deeds &c. 3 Inst 173. 3 Mc 227-8. Gilb 17-23.

There are the rules relating to the manner of proving records

The next object of enquiry is against whom records may be evidence in a civil suit.

And in general a verdict or Judg in a civil suit is evidence only as between the parties & their privies and between them it is conclusive. Ray 730. Bac Ab 232. Carth 225. 7 T.R. 112. 1 Mc N. 624. Peak 38-64.

Privity exists in four cases. -

1st Privity in blood as between an ancestor & his heir at law. 1 Inst 352. 3 East 353.

2nd The second kind of privity is called privity of estate as e.g. between Lessor & Lessee, Joint tenants &c. 1 Inst 35 g a. Bull. 232. Gilbert Ev 81. 10 Co 92. 3 V.b. 23. Peak 29-30

3rd Privity of the third kind is called privity in law as between husband and tenant in dower. 1 Inst 352. 3 East 353.

4th Privity of the fourth kind is called privity in representation as between testator & Ex or Intestate & Administrator. 4 Co 123-4

We now proceed to enquire into the effect of Judgt between the parties & their privities.

And on this subject it is an established rule that a Judgt by a Court of competent Jurisdiction directly on the point in question is forever conclusive against the parties & their privies. 6 Co 7. 2 Bk R 827. Cro E 668. 2 Vent 169. 1 Lu 235 Ambler 761. Peak 34-6.

Hence if final Judgt has been rendered in a suit it can be impeached only by due course of Law i.e. by bill in Eq - writ of error - appeal - or in connect by praying for a new trial. Final Judgt can never be impeached or called in Question in any collateral way,

i.e. by any original action Peak 31. 1 Day 170.

The reason of this latter rule is that a final Judgt deciding any legal right must determine the controversy or litigation would be endless.

The rule is the same as to awards of Arbitrators & decrees in Eq. these being equally conclusive until set aside by due course of Law. 1 Day 130. 3 i.e. 30. Peak 68-75.

If thro' Judgt has been given for dft on demurrer or plea to the action or in any way so the right is decided, the Plff cannot while that Judg remain in force maintain any similar or concurrent action for the same cause, because the form of the action cannot vary the rights of the parties. 3 Wils 304-240. 2 Bek R 827. 3 Ean 346-352-3. 6 B 7. 6 Mod 20.

But this rule does not hold where the action is misconceived or when it fails for want of the necessary allegations, because the rights of the parties are not decided for the grounds of claim are different. 2 Vent 169. 1 Bac 116-7. Co 6. 66-7-8. 8 Ray 472. 2 Mod 318. 3 i.e. 1-2. Plff may traverse the averment that the grounds of action are the same. On the other hand if Judgt is given for the recovery of his debt or demand it is conclusive evidence of the existence of that debt against the Deft & his representatives whether given on demurrer or otherwise 7 T.R. 769. 3 W.P. 232. 1 Day 170. Peak 34-5.

Hence the Deft. can never recover back money levied under such Judgt tho he have the clearest evidence that it was paid before Judgt rendered or that it was never due. Nor can he maintain an action against the Plff for fraud in obtaining the Judgt for this would be collaterally impeaching the Judgt. 1 Day 130. 3 i.e. 30. Peak 35. 68-75 2 Wm Bek 414. 7 T.R. 269.

The same rule holds true in regard to decrees in Chan and awards of Arbitrators Peak 68-75. 1 Day 130. 3 i.e. 30.

The case of Moses vs Mc Farland 2 Burrow 1009 has been supposed by some to to impugne this rule but I think it does not interfere with it. If it does it has been overruled & is not Law.

And it has been decided that if a party on being sued pays the demand before Judg demand tho he be at the time doing, that it is due

he cannot recover it back. 1 Esp Co 84- 279. (2 Gould thinks this rule not within the principle & not sound)

On the other hand a Judgt recovered by the Plff for only part of his demand will be conclusive evidence against him that no more is due for it is substantially the same as a Judgt in favor of the Deft as to the other part. But if his declaration on two separate demands & he attempts to prove but one a Judgt will be no bar to a subsequent action on the other 6 T.R. 607. Peak 35-6.

In the application of this rule there is a distinction between real & personal actions. 6. T. 7.

In real actn also there are various degrees some being of a higher nature than others. Hence a Judgt in a personal actn or in a real one of an inferior nature is no bar in the first instance to a real one & in the last to a real one of a higher nature, for the right decided is different.

As if A. sues B in Trespass Quare Clausum fregit & recovers. & afterwards B brings a real action as Ejectment the former Judgt is no bar to the latter actn for the first the first respected only the possessory interest the last is to settle the real title 3 East 258-9.

But in every species of actn a Judgt so far as respects the immediate matter in issue is a conclusive bar 3 East 357.

Hence if any precise fact is directly put in issue in any actn the Judgt is always conclusive as to that fact.

As if in trespass the fact that J. S. died seized is put directly in issue the Judgt will afterwards be conclusive even in a real actn, 3 East 346-54-5-8-66.

To make a record in a former suit conclusive upon any point or matter of right it must appear from the record itself that such point or right was directly put in issue & found.

As where Plff sues on a contract on which he has been barred in a former suit the Judgt is in such case conclusive against him.

On this subject it must be observed that it is always admissable to show by extrinsick proof that the subject of

controversy is the same or different, as necessitate rei for this cannot appear from the record. In these cases this distinction is to be observed that whether a given point was in issue must appear from the record but whether the subject of the controversy be the same or different may may must be shown by extrinsick evidence.

But in an action for performing work unskillfully the record of a former action in which the Deft recovered a compensation for performing the work is no Ev. against the Pltff for it does not appear that the unskillfull performance was put in issue or at all relyed on as a defence 16th 43. 2 Dons 24.

And a prior Judgt between the same parties is conclusive as well when the point decided by it comes afterwards incidentally in issue as when it forms the ground of suit

As in an action on a policy of insurance with a warranty of neutrality, a sentence of a Court of Admiralty condemning the Ship as enemies property is conclusive evidence as to the point of neutrality. Dick. R. 244. 8 T.R. 196-434. 2 East 268-473. 7 T.R. 523. Doug 554.

To illustrate the rule by another example. If in an action of Ejectment by an heir at law a Question should arise as to Pltffs legitimacy, a prior sentence of an Ecclesiastical Court as to the marriage of his Parents is Conclusive.

But a prior Judg. is no evidence on a point which arose incidentally in a former suit. 1 Vols 333 or 53. T.R. 233-44

As if in a suit between A & B. it is determined that a witness offered is legally infamous. the Judgt in the former suit can be no evidence in the second for the Question arose collaterally & the record discloses no such fact.

And the Judgt of a Court in a point only incidentally cognisable by it is no evidence between the same parties in another suit.

As e.g. when a question of Admiralty Jurisdiction arises incidentally in a Ct of Com Law. As whether there were contraband goods on board in an act on a policy of Insurance the Judg would be no evidence between the parties in a subsequent suit. Peake 76.

The rule is the same in regard to a point merely inferable by argument from a former Judgt.

As if A sues B on a contract & B defends on the ground of infancy it is not competent for A to show that he formerly sued B on contract & recovered for the record discloses nothing in regard to the Question of B's infancy.

And a prior Judg^t in a suit between the parties on the general issue is not conclusive tho the right or title is the same unless the cause of action is the same.

As if A sues B for a nuisance & recovers & afterwards brings another acn for the continuance of the same nuisance &c. cannot give the first Judg^t in bar of the second action for tho the right infringed is the same yet it is not the same identical infringment Peak 37-8. B.N.P. 232. 3 East 365.

The same rule holds in Eng^d in the action of Ejectment and in all places where the English form of ejectment is used. See R on Ejectt 12. Peak 37-8.

But in these & all similar cases the verdict is evidence tho not conclusive. B.N.P. 232. Gilb 29-30-32-35. Bl. 308. 1191. Carth 79-181.

The foregoing example goes to show that the Judg^t is not conclusive unless the cause of action as well as the right on which it is founded be the same.

But if the title or any particular fact have been put in issue distinctly & found, the verdict as to that point is considered conclusive 3 East 346-54-5-8-66.

Therefore a verdict may sometimes be evidence tho not conclusive when a Judg^t in the same matter could not be given in evidence. There is a distinction between the two.

A prior Judg^t on a Question of right is a sentence of law deciding that right.

A verdict is mere evidence of a matter of fact tho when it is pleadable & plead by way of estoppel it is conclusive.

The object of a Judg^t is to show a right determined by it on facts as ascertained by verdict or otherwise.

That of a verdict is merely to prove matter of fact. Peak 37 3 East 358 to 65.

Prior Judg^t when evidence at all is conclusive evidence Amb 756-61. 1 Sw 235. 1 Esp 170. Peak 34-5-7.

Hence a prior Judg^t cannot be given in evidence except in certain exempt cases nor can it be used at all unless the cause of

action be the same in both suits.

But a verdict to be conclusive between the parties & their privies must be pleadable & plead by way of estoppel but it may sometimes be given in evidence when not conclusive. B. & P. 232. But not unless the point was directly in issue in the former suit. 3 East 365. Gilb. Ev. 35. Peak 37.

But the cases to which this rule applies are those when the cause of action is not the same tho depending on the same title or the same set of facts. Ex. if two pieces of land be holden by one and the same title as a deed or devise a verdict in an acn for one may be given in evidence in an acn for the other tho it is not conclusive. Gilb. Ev. 30. B. & P. 232. H. 308 - 1151. Carth. 79-181. 2 Mod. 142. 5 i. e. 386.

A prior verdict in a suit for nuisance or disturbance may be given in evidence in a subsequent suit for a continuance of the nuisance or a repetition of the disturbance but the verdict will not be conclusive for the causes of action are not identical tho they arise out of the same cause or right. 3 East 365. Peak 37-8.

Again a verdict in a prior acn of Eject for a given piece of land may be given in evidence in a subsequent suit between the same parties for the same land. tho it is not conclusive for it does not appear on the record that they are the same parties i.e. in the form of acn when fictitious names are used. Gilb. 35. Bul. 232. Peak 40.

In Swift's Ev. a rule is laid down which may lead to a mistake unless noticed. It is this that a verdict cannot be given in evidence unless the facts which it imports to determine are specially in issue & found. But this cannot be law. Sa. Ev. 18.

The true rule is that such verdict can not be given as conclusive or plead by way of estoppel. But it may be given as part of the mass of evidence or as furnishing a degree of proof in connexion with other evidence.

Thus much as to the effects of Verdicts & Judgts when admissable. We are now to enquire for & against whom they are evidence.

And it is a general rule that a verdict or Judgt in a former civil suit is no evidence of the facts or rights which it imports to establish except between the parties to such suits their privies.

The principle of the rule is this that third persons are not in general to be bound or affected by a Judgt or verdict between other persons, because not being parties to the suit nor appearing on the record, they have had no opportunity of defending or bringing a writ of error, or appeal or in any way of availing themselves of any error or irregularity in the proceedings in the former trial they ought not therefore to be affected by the verdict or Judg. Gilb 29 32 3. Rec. in Cham 212. 2 Ld R 1392. 3 Mod 142. B.N.P. 233-2. 242.

And as the benefit of the rule should be mutual third persons cannot take advantage of such verd or Judgt even against the parties themselves. The reason is that it is res inter alios acta. Gilb 34-5. B.N.P. 232. 3 Mod 141. Hard 472.

There are one or two exceptions to the generality of these rules but they are so complex that you will better understand them if I refer you to the examples in Peak 35-7 Gilb 33 to 5. 2 Ld 730. B.N.P. 232.

But the rule that a record is no evidence except between the parties & their privies is by no means universal. There are several exceptions. As 6thly. Where one person uses for his own benefit the name of another as party to a suit the verdict will be evidence tho not conclusive evidence for or against the former.

The reason is that the nominal parties on the record are different therefore the cannot, in conclusion but the Court will so far recognize the real parties interested as to admit the record in evidence. As if A brings an act of Ejectt against B. in the name of John Doe & afterwards brings another for the same land in the name of Richard Roe. now the first verd. cannot be plead by way of estoppel in the second action, for the parties appearing on the record are different. The Court will however admit proof to show that the real parties are the same & then admit the verdict in evidence. — B.N.P. 232 Gilb 33. Peak 40.

And in this case the verdict is evidence both ways. i.e. if John Doe recovers in the first act the verdict is evidence for Richard Roe in the second & vice versa.

So also if an action of trespass is brought against A who justifies as the servant of S. S. the verdict is evidence tho not conclusive in a subsequent action against B for the same cause B justifying on the same ground. And it is the same evidence both ways. for S. S. is virtually tho not nominally the party interested in the suit. Peak 40. Doug 517.

Another exception to the general rule is when the point in dispute is a question of publick right. In such cases a verdict finding or negativing the right in a certain suit will be evidence in a subsequent suit between different parties tho not conclusive.

So also when the point or right in dispute is founded on a custom which is denied & that custom is found by a Jury. This verdict is evr in a subsequent action founded on the same custom tho not conclusive. Peak 156-219. 1 Esp 353. Cathew

As if a city or corporation brings an action against A. claiming a certain toll by right of custom or prescription, in a subsequent action against B. for the same toll the first verdict will be evidence for or against Defendant according as the Jury find the existance or nonexistance of such custom. The principle on which the rule is founded is this that as the right in dispute is a publick one & therefore every individual in the community is thus virtually a party, i.e. he is a party so far as respects the establishment or negation of the right.

Again. The sentences of Courts whose proceedings are in rem are generally conclusive against all persons whether parties interested or not. Proceedings are said to be in rem when they operate directly on the subject of controversy.

As if A is the owner of a ship libelled in a foreign port & condemned. Now if B who belongs in another country or continent claims it the verdict against A. is forever conclusive against B.

The reason is that all persons or any person on earth have a right to appear & claim & defend the Ship before condemnation & are thus potentially parties in the case. For the action is not against any individual but against the property directly. 8 D.C. 196-454. 7 i.b. 523-681 8 i.b. 295. 2 Dart 208. 2 Blk R. 977-1174.

When therefore any matter determined in such Court comes afterwards incidentally in Question in a Ct of Com Law. (and it must come incidentally if at all). That sentence is conclusive.

Eg. In an action on a policy of insurance with a warranty of neutrality if the underwriters can show such sentance & condemnation of an Admiralty Court it is conclusive & they are discharged. Ante. Supra.

The rule is the same & for the same reason in regard to the sentences of Prerogative Courts & Cts having Jurisdiction of the probate of Wills & Administration. For the same reason

I say for him also all persons are potentially parties, as any one has a right to exhibit his claims ag[ain]st him at law. &c

Hence when one was indicted & produced the probate of the will under sentence of the Court of Probate. it was holden conclusive & he was immediately discharged. 1 Sec. 235. 3 T.R. 125. Peak. 78. n. 1 Lay. 170. 2 Lib. 312.

So also if A brings an action as Exec[u]tor to B & the Defend[an]t pleads that he is not Ex[ecu]t[o]r the record of the Court proving the will is conclusive evidence in favor of A. – St. 481-703.

Now it may be asked on these cases within the rule respecting Courts whose proceedings are in rem. I answer. Because any individual may appear & become a party. For the proceedings in P.C. are not in the nature of a private suit but are open to all, & therefore all must be bound by them.

There are several cases which have been supposed contradictory to this rule. But the cases thus supposed to oppose the rule do not. for in them the Court had no jurisdiction as the persons whose wills were proved were not dead at the time of proving & the death of the testator being absolutely necessary to give the Ct jurisdiction. The proceedings were coram non judice & therefore void.

Or the sentence was obtained by a fraud on the Court & therefore is now nullity. Leach Crown Ca. 103. n. 2 Mee. 409. n. 3 T.R. 125. Mee. 48-8-50-61.

So general also Judgts or Sentences of Ecclesiastical Courts in matrimonial cases as on Question of Marriage or divorce are conclusive whenever the Question afterwards comes incidentally in issue in a Ct of Law. As in action of Ejectment by heir at Law.

And it is equally conclusive whenever may be the other party. Arab. 736-762-3. 11 Co. 29. 7 Lib. 4. Carth. 225. 81-961

Again in an act[io]n for Crim. Con. a prior sentence of an Ecclesiastical Court annulling the Marriage is Conclusive in favor of the Deft. St. 960. Peak 77. n. Arab. 756-63.

So also if an action is brought against a man for a debt contracted by his wife while Sole. A sentence of an Ecclesiastical Court determining his marriage to be void. is conclusive against the Pltff. For as the debt was contracted before the supposed the Deft gave her no false credit. 11 State Trials 235. Peak 78.

And this tho the Pltff was no party. The reason probably is that as the sentence is in the nature of a proceeding in rem,

it ought to conclude third persons tho they neither were nor could become parties to the suit. But why? I answer. A sentence of an Ecclesiastical Ct. operates directly upon the marriage and annihilates it, & when the proceedings are in rem they must in the nature of the case be conclusive against all persons.

Such a sentence however is not conclusive in an indictment for bigamy. As if A. is indicted for marrying B. while he had another wife living he may be convicted notwithstanding the sentence of an Ecclesiastical Court declaring the second marriage good. This sentence is not conclusive because it is said that the case involved a question over which the Court had no jurisdiction. viz. the Criminal Case of Bigamy. 11 State Trials 261

It seems difficult however to distinguish this from the former case of Probate sentence. But the distinction is said to be that the King who is a party to the last act had no right to make himself a party in the Eccles. Court. whereas the proceedings in Probate were open to all persons.

And in the case already mentioned individuals who are strangers to the action may show that the sentence was obtained by fraud between the parties because these extrinsick facts pollute & make void the most solemn proceeding. A fraud by one party upon the other would not have such an effect but this is a fraud upon the Ct. & Law. & when two parties combine to impose upon the Ct they shall never reap a benefit from it. 2 Vezey 246. Amb. 762. 11 St. Trs. 262.

So also when one has been compelled by suit to pay money for another & afterwards sues for a reimbursement he may give in evidence the record of the former suit against himself the Deft was no party to the suit. But the record is in such cases admissable not to show that the Deft was the principle or that he was under any obligation to Pltff but only to show the fact that he has paid money & how much, which are essential & can be shown in no other way. And still the Defendant may deny that the Debt was due.

So also when the Sheriff has been sued for the default of his Deputy & sues for reimbursement he may give in evidence the rec. of the suit against himself. as in the last case, but not to prove the guilt or liability of such Deputy. The rule is the same when the endorser of a bill of exch^t is sued for the default of the acceptor. or a master for the act of his servants

Again in an action on the covenant of warranty in a deed the Pff may give in evidence the record of a prior suit by which he was evicted for the purpose of proving the fact of eviction the the present Deft was neither party nor privy to that suit. For this is a fact which must be proved as without actual eviction there can be no recovery. But such record is no evidence whatever that the title of the grantor was not good. this must appear from the sources. Dyer 28. Yelv. 32. 1 Rolle 396.

But if the Covenantor was vouched in, in the prior suit the record is conclusive evidence against him. For a better account of this subject see my Title of Cov. book.

So also in an action on a warranty of title to a personal chattel the Pff. may give in evidence the record of the former recovery against himself, merely for the purpose of proving that he has lost the property. 1 Jones 317. S.C. 15

So also a former recovery & satisfaction obtained by the Pff for the same cause against a stranger is evidence for the Deft that such prior recovery and satisfaction have been had. As if the holder of a bill of exchange bring an action against the endorsor the Defe. may give in evidence the record of a former suit in which the Pff. recovered against the acceptor.

So also if a joint trespass has been committed by A & B. & Pff. brings an action against B. Deft may give in evidence the record of a judgment obtained in a former suit against A for the same trespass. & this judgt will be conclusive against the Pff tho no satisfaction was ever obtained upon it. & the same is true in all cases of Joint Torts. Co. 173.

Again in those cases in which a party to a suit derives his title from a Judgt in a former suit between himself & a stranger he may give in evidence the record of that Judgt. Swt. Ev. 14. As if A brings his action against B. for a piece of land which B claims under a Judgt & beg of Execution against J. S. B may give in evidence the record of such Judg & Ex. to prove that he has all the title which J. S. had. but that J. S. title was good must be shown from the sources. Here the record is inter alios acta. but as it contains & is the only evidence of Deft title it is in the nature of a common assurance or

conveyance & must therefore be introduced, or necessarily.

And a record in such case is evidence both ways.

Thus much in regard to the admissability of prior verdicts & Judgments in Civil suits.

Whether a verdict in a prior ~~criminal~~ case can be used in a subsequent civil suit to prove the point found in it remains a Question at this day. As if A commits a battery on B. & is prosecuted & convicted for a breach of the peace. Afterwards B commences a civil suit for damages. Can the record of the former conviction be given in evidence by B. (See 1 Gould it cannot.

Peak 41 68. 146-8 n. Philip. 87-8. 4 Bur. 2225. 4 East 577 n-581
1 Camph. 9-151. Salk 283. 1 Sid. 325. Gilb 30-2. Bul 245.

But a record in a prior civil or criminal case is doubtless evidence to show that such suit was tried.

As if on an indictment for perjury the record of a suit between A & B.— to show that such a suit did exist— as that in which the Prisoner is charged with having perjured himself: is the proper evidence. 1 Sel. P 243. Peak 48.

But a verdict in a former suit is in no case evidence of the facts found by it until final Judgt has been entered upon it. Therefore when it is competent for a party to introduce a record to prove a fact found by it, it must also be accompanied by the Judgt rendered upon it; else it will be presumed that the Judgt has been arrested or set aside.

Strange 141. Bl. P 243. Philip. 292.

But the rule does not apply when the object is to prove that such a suit has been had for whether Judgt remains or is set aside the record is sufficient to prove that such a trial or suit has been had. And in such cases the postea is alone sufficient. Bul. P. 243. Peak 57.

And a verdict out of Chancery without a decree in pursuance of it is no evidence of the facts found by it. But a decree is as necessary in this case as a Judgt in the last, for a decree in Chan is nothing more or less than a Judgt in a Ct of Law, the name only is different. B.N.P 234. Phill. 292. Peak 56.

There are some rules of evidence necessary to be known in this country, which are not found in Com Law Books.

I refer to the rules relating to the mode of proving in one State the records of another.

And here I would observe that the records of the U.S. as the acts of Congress & of the United States Courts are provable in the same manner as their own.

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